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No. 95-

In the Supreme Court of the United States

OCTOBER TERM, 1995

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

DARRYL COVINGTON, *et al.*,
Respondents.

Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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86pp

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the District of Columbia Circuit (June 23, 1995) 1

Memorandum Opinion of the United States District Court for the District of Columbia in *Covington v. District of Columbia*, Civil Action No. 87-2658 (December 13, 1993) 28

Order of the United States District Court for the District of Columbia in *Covington v. District of Columbia*, Civil Action No. 87-2658 (December 13, 1993) 51

Memorandum Opinion of the United States District Court for the District of Columbia in *Sexcius v. District of Columbia*, Civil Action No. 88-2104 (December 13, 1993) 52

Order of the United States District Court for the District of Columbia in *Sexcius v. District of Columbia*, Civil Action No. 88-2104 (December 13, 1993) 75

Memorandum Opinion and Order of the United States District Court for the District of Columbia in *Galloway v. The Superior Court for the District of Columbia*, Civil Action No. 91-0644 (April 21, 1994) 76

Order of the United States Court of Appeals for the District of Columbia Circuit denying Petition for Rehearing (September 12, 1995) 82

Order of the United States Court of Appeals for the District of Columbia Circuit denying Suggestion for Rehearing *In Banc* (September 12, 1995) 83

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 18, 1995 Decided June 23, 1995

Nos. 94-7014, 94-7015, 94-7022, and 94-7107

DARRYL COVINGTON; TRACY DEW-BEY; DAVID EDWARDS; LEE ROY FERGUSON; RAYMOND GANT; CHARLES HARRIS; DONALD HUNT; LARRY LEE; LEO WRIGHT; AND CHARLES BARBER,
APPELLEES

v.

DISTRICT OF COLUMBIA; R. BARNES; JAMES BRYANT; P.D. BULLOCK; L.C. CHILDS; D.P. DALTON; H. KING; ROBERT NEWKIRK; M.L. RANDLE; G.M. CUTLER; R. JACKSON; R. NICKENS; F. SCHULER; L.D. JOHNSON; D.E. MARSHALL; L. SESSE-KHALID; RITA GOODALL; OTHER CORRECTIONAL OFFICERS; OTHER UNKNOWN PRESENT OR FORMER DISTRICT OF COLUMBIA LORTON CORRECTIONAL FACILITY OFFICERS,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(Civ. No. 87cv02658)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Donna M. Murasky, Assistant Corporation Counsel, argued the cause for appellants. With her on the briefs were *Vanessa Ruiz*, Corporation Counsel at the time of filing of appellant's brief, *Charles L. Reischel*, Deputy Corporation Counsel, and *Erias A. Hyman*, Acting Corporation Counsel. *John A. Payton* entered an appearance.

Roger E. Warin argued the cause for appellees. With him on the joint brief were *Mindy A. Kaiden*, *Michael J. Gaffney*, *Daniel M. Schember*, *Vicki Golden*, and *David Cashdan*.

Before: EDWARDS, *Chief Judge*, WALD and HENDERSON, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* EDWARDS.

Dissenting opinion filed by *Circuit Judge* HENDERSON.

EDWARDS, *Chief Judge*: This appeal involves consolidated challenges to attorneys' fee awards granted under 42 U.S.C. § 1988 (1988 & Supp. V 1993) in favor of prevailing parties (collectively "plaintiffs") in three civil rights cases against the District of Columbia ("District"). In support of the fee claims, the plaintiffs' attorneys submitted to the District Court declarations describing their billing practices—explaining that when they do bill clients, they charge reduced rates for non-economic, public-spirited reasons—as well as information indicative of their skill, experience, and reputation. They also submitted evidence of the prevailing market rates for complex federal litigation in the District of Columbia. The District opposed plaintiffs' fee applications, claiming that plaintiffs' requested rates were substantially higher than rates charged by similarly experienced attorneys who litigate civil rights and employment discrimination cases in the District of Columbia. In support of its position, the District submitted an affidavit of the Assistant Deputy Corporation Counsel, who recounted rates charged by nine plaintiff attorneys and contended that those rates more accurately reflected prevailing market rates. The District Court disagreed.

The District Court found that plaintiffs' attorneys intentionally charged their poorer clients reduced rates for non-economic, public-spirited reasons. The record indicates plain-

tiff counsels' years of legal experience as well as their ability to handle complicated federal cases. The court found that the relevant market was complex federal litigation and that plaintiffs' requested rates were in line with those prevailing in the District of Columbia for similar services by lawyers of reasonably comparable skill, experience, and reputation. Thus, relying on established law, the District Court granted plaintiffs' motion for reasonable attorneys' fees. Finding no abuse of discretion, we affirm the judgments of the District Court.

In section 1988 attorneys' fee cases, attorneys who customarily charge reduced fees reflecting non-economic, public-spirited goals may seek fees based on the prevailing market rates if the prevailing party demonstrates the reasonableness of the requested hourly rates. That burden entails the following: first, if the attorney customarily charges clients lower rates than plaintiff has requested under section 1988, the attorney must demonstrate that the customarily reduced rates are charged for non-economic reasons; second, the attorney must offer information documenting his or her skill, experience, and reputation; and third, the attorney must produce evidence of the prevailing market rates in the relevant community for attorneys of comparable skill, experience, and reputation. In the instant cases, plaintiffs met this burden, and the District offered little by way of rebuttal. Accordingly, the District Court did not err in finding plaintiffs' requested rates reasonable and granting the motions for attorneys' fee awards. Nor did the District Court err in determining that *complex federal litigation* was the relevant market for purposes of establishing the prevailing market rates in the District of Columbia. Accordingly, we affirm the District Court's attorneys' fee awards in all three cases.

I. Background

In these consolidated cases, plaintiffs supported their motions for attorneys' fees by submitting evidence of their attorneys' billing practices, their attorneys' legal experience, skill, and reputation, and the prevailing market rates for

complex federal litigation in the District of Columbia. Plaintiffs' motions were granted in all three cases. Although each case involved a different claim—*Covington v. District of Columbia*, 839 F. Supp. 894 (D.D.C. 1993), was a prisoners' rights case; *Sexcius v. District of Columbia*, 839 F. Supp. 919 (D.D.C. 1993), was a First Amendment case; and *Galloway v. Superior Court*, Civ. Action No. 91–0644 (D.D.C. Apr. 21, 1994), was a handicap discrimination case—and each was brought by different attorneys, the plaintiffs in each case submitted substantially similar evidence. A detailed review of the evidence presented in *Covington* will suffice to provide the necessary foundation for our analysis.[1]

Attorneys for the plaintiffs in *Covington* brought a section 1983 action on behalf of ten prison inmates who were beaten while shackled and handcuffed and nine inmates who were sent to a maximum security facility without proper hearings. *Covington*, 839 F. Supp. at 895. The jury found for the plaintiffs, the District appealed, and then the parties settled while the appeal was pending. *Id.* The settlement provided that plaintiffs were entitled to an attorneys' fee award; but when the parties could not agree on the appropriate hourly rate, the plaintiffs filed a motion for attorneys' fees.

Plaintiffs' fee application included information pertaining to counsels' billing practices; their experience, skill, and reputation; and the prevailing market rates for complex federal litigation in the District of Columbia. Specifically, the lead attorneys in the case, Michael Gaffney and Daniel Schember, submitted declarations, explaining that they compose a two-attorney firm which handles federal court litigation concerning civil rights and civil liberties, military and veterans law, employment and labor law, and administrative proceedings. According to their declarations, Gaffney and Schember

[1] For the sake of simplicity, our references to the parties and to the District Court will focus on the *Covington* litigation. We emphasize, however, that there are no material differences in the three cases on the principal points here in issue, and neither side suggests otherwise.

choose clients and cases based on "commitments to the clients and to the constitutional and statutory rights at issue," Declaration of Michael J. Gaffney at 5, Joint Appendix (J.A.) at I–163, and they offer needy clients reduced or below-market rates for these non-economic reasons.[2] The ten inmate plaintiffs in *Covington* were indigent. As Schember's declaration explains, the lead attorneys took the case "to seek to enforce the constitutional prohibition against punitive beating of prisoners." Declaration of Daniel M. Schember at 6, J.A. at I–155. Gaffney's and Schember's declarations each recount their significant experience since 1975, at the Lawyers Committee for Civil Rights Under Law, and since 1977, at their own firm, practicing federal court litigation on a variety of issues.[3] Their declarations also provide indications of their reputations, listing teaching positions[4] and fellowships,[5] awards received,[6] participation in congressionally mandated

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[2] From 1986 to 1990, Gaffney's and Schember's highest hourly rate was $125, and from 1990 to the present, their highest hourly rate was $150. They also accept clients on an attorneys' fee award or contingency fee basis. Declaration of Gaffney at 2, 12–13, J.A. at I–160, I–170–71.

[3] Schember and Gaffney were lead or sole counsel in several cases brought in federal district court, federal court of appeals, and the Supreme Court. Declaration of Schember at 2–5, J.A. at I–151–54; Declaration of Gaffney at 2–4, J.A. at I–160–62.

[4] Schember taught administrative law, constitutional law, and advanced legal research and writing at Antioch School of Law as an adjunct professor during the 1980s. Declaration of Schember at 5, J.A. at I–154.

[5] Gaffney received an education law fellowship from the Legal Services Corporation's Research Institute for Legal Assistance to co-author a paper on organizing the private bar to address the problems of urban education. Declaration of Gaffney at 8, J.A. at I–166.

[6] In 1982, the ACLU Fund of the National Capital Area awarded their firm the Alan Barth Service Award for their effort in *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Declaration of Gaffney at 7, J.A. at I–165.

studies,[7] and chairing the D.C. Bar's Committee on Military and Veterans Rights.[8]

Two other attorneys in the *Covington* case, Linda Delaney and Mark Hager, also submitted declarations regarding their billing practices and experience. Delaney's declaration revealed that when she bills clients, she charges below-market prices for non-economic reasons.[9] Declaration of Linda A. Delaney at 5–6, J.A. at I–189–90. Delaney, who has practiced law since 1984, submitted descriptions of eight federal civil rights or employment cases in which she was involved as well as actions brought in District of Columbia courts. Declaration of Delaney at 2–3, J.A. at I–186–87. Hager, who holds a J.D. and a Ph.D. from Harvard and currently teaches law at American University, stated that he does not have a standard hourly rate for litigation. Declaration of Mark M. Hager at 1, 3, J.A. at I–191, I–193. He practiced law full time for one year at a Boston law firm, doing commercial and criminal defense litigation, and since 1987, when he began teaching full time, he has represented clients in political asylum cases, employment cases, prisoners' rights cases, and has acted as a commercial arbitrator. Declaration of Hager at 1–3, J.A. at I–191–93. In addition, plaintiffs used the services of two law

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[7] Schember and Gaffney have participated in several federally funded inter-disciplinary policy research studies concerning implementation of federal education programs. Declaration of Gaffney at 8, J.A. at I–166.

[8] Gaffney also served on the board of directors of the National Veterans Legal Services Project, a non-profit organization funded by the Legal Services Corporation, Vietnam Veterans of America, and the Agent Orange Class Assistance Program. Declaration of Gaffney at 9, J.A. at I–167.

[9] In 1988, Delaney set her hourly rate at $125 and has not changed it. She asserted that she "essentially permit[s][her] clients to pay what they could afford when they could afford it." Declaration of Delaney at 5, J.A. at I–189.

graduates and two law students. *Covington*, 839 F. Supp. at 900–01.

The *Covington* plaintiffs submitted a good deal of evidence establishing the prevailing market rates for comparably experienced attorneys handling complex federal litigation. They submitted the original *Laffey* matrix, a schedule of charges based on years of experience developed in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985).[10] Plaintiffs also submitted affidavits attesting to increases in the market rates since the original *Laffey* matrix was established; the U.S. Attorney's Office version of the updated *Laffey* matrix; the memorandum opinions in *Robles v. United States*, Civ. Action No. 84–3635, (D.D.C. Jan. 10, 1992), J.A. at I–119, and *Fischbach v. District of Columbia*, Civ. Action No. 87–0646 (D.D.C. Jan. 3, 1993), J.A. at I–254, in which district courts awarded fees based, in part, on the *Laffey* matrix; and an EEOC decision, *Hatfield v. Garrett*, Appeal No. 01892909 (E.E.O.C. Sept. 26, 1990), J.A. at I–90, in which the EEOC awarded attorneys' fees using the updated *Laffey* matrix.[11]

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[10] The original *Laffey* matrix rates for 1983 were as follows:

$175 an hour for very experienced federal court litigators, *i.e.*, lawyers in their 20th year or more after graduation from law school;

$150 an hour for experienced federal court litigators in their 11th through 19th years after law school graduation;

$125 an hour for experienced federal court litigators in their 8th through 10th years after graduation from law school;

$100 an hour for senior associates, *i.e.*, 4 to 7 years after graduation from law school; and

$75 an hour for junior associates, *i.e.*, 1 to 3 years after law school graduation.

Laffey, 572 F. Supp. at 371. The *Laffey* court noted that plaintiffs' fee matrix was supported "with a barrage of data." *Id.*

[11] *Covington* attorneys also submitted 1988, 1989, and 1990 hourly rate information for lawyers in more than a dozen local law firms used by plaintiffs in *Lewis v. Brady*, Civ. Action No. 82–0918 (D.D.C. Feb. 7, 1991), J.A. at I–113–17, as well as affidavits from

Based on this evidence, plaintiffs requested fees for Schember and Gaffney at a rate of $260 per hour, which represented the 1993 prevailing market rate [12] for experienced federal court litigators with eleven to nineteen years of experience in an updated version of the *Laffey* matrix [13] and the U.S. Attorney's Office matrix.[14] Plaintiffs requested attorneys' fee awards at an hourly rate of $160 for Delaney and Hager, which represents a rate just under that suggested by the U.S. Attorney's Office matrix for attorneys with four to seven years experience. Finally, plaintiffs requested that the two law graduates be awarded $85 per hour (less than the prevailing market rate of $125 under the U.S. Attorney's Office matrix), and that the two law students be awarded $70 per hour (the prevailing market rate for paralegals and law clerks under the U.S. Attorney's Office matrix). *See Covington*, 839 F. Supp. at 900–03.

The District opposed plaintiffs' request for attorneys' fees, arguing that a submarket of plaintiff attorneys who handle civil rights and employment discrimination cases existed, and that the prevailing market rate for this submarket of attor-

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four attorneys in *Robles* attesting to the reasonableness of annual increases of $10 per hour for the updated *Laffey* matrix. *See* J.A. at I–141–49.

[12] Plaintiffs requested current market rates rather than the rates that prevailed in the market when counsel actually worked on *Covington* to compensate for the delay in payment of their attorneys' fees. *See Covington*, 839 F. Supp. at 902.

[13] Although the *Laffey* matrix charts fees only up to 1988–89, the *Robles* district court updated the *Laffey* matrix by adding $10 per hour to the 1988–89 hourly rate of $220 and to the hourly rates of each succeeding year. *See Covington*, 839 F. Supp. at 900 (citing *Robles*, Civ. Action No. 84–3635, slip op. at 16 & n.7).

[14] The U.S. Attorney's Office developed its fee matrix by adding the Consumer Price Index increase for the Washington, D.C., metropolitan area to the prior year's rate and rounding upwards if the sum is within $3 of the next $5 multiple. *See Covington*, 839 F. Supp. at 900.

neys with between ten and twenty years of experience was well below that requested by plaintiffs in this case. In support, the District submitted the declaration of Michael Zielinski, Assistant Deputy Corporation Counsel in the Civil Division of the Office of Corporation Counsel, who recounted plaintiffs' requests for attorneys' fees in nine cases brought by solo practitioners or small firms against the District of Columbia. Zielinski Declaration at 2–7, J.A. at I–218–23. Zielinski suggested that there were "a large number of attorneys in the District's legal marketplace who . . . litigate complex cases like employment discrimination and civil rights actions and who have established hourly billing rates at or near $150." Zielinski Declaration at 8, J.A. at I–224. A majority of the nine plaintiff attorneys identified by Zielinski had requested attorneys' fees at their usual billing rates; and two of the attorneys had sought market rates akin to those in the *Laffey* matrix.

The District Court found for plaintiffs and awarded them the requested attorneys' fees. The trial judge noted that, because the *Covington* "plaintiffs' assertions that their counsel have taken public interest cases for below-market rates are reasonably well-documented" and that these assertions were "virtually unchallenged," the court would "take plaintiffs at their word." *Covington*, 839 F. Supp. at 897. The District Court Judge also noted that "[p]laintiffs' counsel handled very well this complicated federal case, which involved the constitutional claims of ten plaintiffs against sixteen defendants, lengthy discovery, many motions and a jury trial." *Id.* at 895. The District Court found that plaintiffs presented "sufficiently persuasive evidence charting the prevailing market rates of litigators of complex federal matters." *Id.* at 898. In reviewing the evidence plaintiffs submitted on the prevailing market rates, the District Court noted that the *Laffey* matrix had been "relied upon, at least in part, by six District of Columbia district judges and that [it had] received a degree of approval" from this court in *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (*en banc*). *Id.* (citations omitted). The court also reviewed the fee matrix

"developed by the U.S. Attorney's Office for the District of Columbia that the U.S. Attorney relies upon in settlements." *Id.* In short, the trial court found that plaintiffs met their evidentiary burden, and that defendants' factual rebuttal of plaintiffs' evidence was ineffectual. *Id.* at 899–900.

The District Court found the District's evidence unpersuasive: "Defendants' sole affidavit . . . cites only seven instances in which lawyers with 10–20 years of experience charged about $150 per hour in representing plaintiffs in civil rights, employment, or discrimination matters. Standing alone, these seven instances are insufficient to demonstrate that $150 per hour is the prevailing rate across the District of Columbia in this sub-market." *Id.* at 898. Finally, the District Court rejected the District's submarket theory, noting that the District had failed to convince the court "that lawyers handling civil rights, employment, or discrimination cases for plaintiffs constitute a sub-market of their own," and that "the prevailing rate in the sub-market . . . is—as defendants claim—lower than the rate prevailing in the broader legal market" of complex federal litigation. *Id.* at 898 & n.8.

The District Court awarded plaintiffs attorneys' fees for Gaffney and Schember at an hourly rate of $260; for Delaney and Hager at an hourly rate of $160; for the law graduates at an hourly rate of $85; and for the law students at an hourly rate of $70. *Id.* at 900–02. Defendants conceded to the reasonableness of the hours claimed in plaintiffs' original motion. *Id.* at 903.

II. Analysis

The fee shifting provision embraced by 42 U.S.C. § 1988(b), covering federal civil rights actions, provides that

> the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In *Blum v. Stenson*, 465 U.S. 886, 895 (1984), the Supreme Court determined that Congress intended

> "reasonable fees" under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel.

Four years later, this court, sitting *en banc*, held that

> the prevailing market rate method heretofore used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals.

Save Our Cumberland Mountains, 857 F.2d at 1524 ("*SOCM*").

This case involves a relatively straightforward application of these principles. The attorneys in the instant cases, who either practice privately and for-profit but at reduced rates reflecting non-economic goals or who have no established billing practice, request the prevailing market rates.[15] Under the Supreme Court's decision in *Blum* and this court's decision in *SOCM*, we think it is quite clear that plaintiffs' attorneys are entitled to an award based on the prevailing market rates, and we can find nothing in the records of these cases to indicate that the trial judges abused their discretion under the statute in awarding fees.

A. The Attorneys' Fee Case

As the Supreme Court has stated, "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). "Parties to civil rights litigation in particular should make a conscientious effort, where a fee award is to be made, to resolve any differences." *Blum*, 465 U.S. at 902 n.19. Where settlement is not possible, case law establishes a clear structure for the determination of reasonable fees.

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[15] Plaintiffs do not request any enhancements above the "lodestar" to compensate their attorneys for the risk of accepting contingency fee arrangements.

Under the statute, the district court is expressly empowered to exercise its discretion in determining the amount of a fee award, *see* 42 U.S.C. § 1988(b); however, a fee applicant bears the burden of establishing entitlement to an award, documenting the appropriate hours, and justifying the reasonableness of the rates, *see Blum*, 465 U.S. at 896 n.11 ("[C]ourts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates."); *Hensley*, 461 U.S. at 437 ("[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.").

As a general matter, this court has characterized the *Blum* formulation as constituting a three-part analysis: "(1) determination of the number of hours reasonably expended in litigation; (2) determination of a reasonable hourly rate or 'lodestar'; and (3) the use of multipliers as merited." *SOCM*, 857 F.2d at 1517; *see also In re Donovan*, 877 F.2d 982, 992 (D.C. Cir. 1989); *In re Olson*, 884 F.2d 1415, 1423 (D.C. Cir. 1989). In this case, however, only the second prong—the determination of a reasonable hourly rate—is at issue. As noted above, a fee applicant's burden in establishing a reasonable hourly rate entails a showing of at least three elements: the attorneys' billing practices; the attorneys' skill, experience, and reputation; and the prevailing market rates in the relevant community. *See Blum*, 465 U.S. at 896 n.11; *SOCM*, 857 F.2d at 1524.

First, in cases in which prevailing attorneys request rates which are greater than those they normally charge, the attorneys must offer some evidence that they charge reduced rates for public-spirited or non-economic reasons. In *SOCM*, the court addressed the claims of attorneys engaged in private, for-profit practice, who "adjusted fee schedules downward from pro bono or quasi public interest motives to reflect the reduced ability of the client to pay or what the attorney saw as the importance and justice of the client's cause." 857 F.2d at 1519. Building on the Supreme Court's decision in *Blum*—which allowed market-rate fees for attorneys in non-profit legal services organizations—the *SOCM* court concluded:

> Congress did not intend the private but public-spirited rate-cutting attorney to be penalized for his public spiritedness by being paid on a lower scale than either his higher priced fellow barrister from a more established firm or his salaried neighbor at a legal services clinic.

857 F.2d at 1524.

As was true in *SOCM*, the burden is on the fee applicant to show that the attorney's billing practices are of the sort covered by the *SOCM* test. That is, the attorney must show that his or her custom of charging reduced rates is in fact attributable to "public spiritedness." Implicit in this line of inquiry is the assumption that the law was not written to subsidize attorneys who charge below-market rates because they cannot command anything more. And a defendant is free to rebut a fee claim on these terms in cases in which the issue is posed. We recognize that, in some cases, this may be a difficult line of inquiry, for an attorney who cannot command market rates invariably will have a "custom" of charging rates below the market. This problem is diminished with respect to attorneys who charge variable rates (both at and below the market, with the latter attributable to public-spirited goals). In any event, it is within the sound discretion of the district court to weigh the evidence to determine whether an attorney customarily charges reduced rates for non-economic reasons.

Second, prevailing parties must offer evidence to demonstrate their attorneys' experience, skill, reputation, and the complexity of the case they handled. In articulating the plaintiffs' burden in these cases, the Supreme Court required that fee applicants "produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11.[16] To

[16] The Supreme Court noted that the Senate Report accompanying the Civil Rights Attorneys' Fee Award Act of 1976 explicitly approved of the "appropriate standards" for awarding attorneys' fees set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d

some extent, this second element of the reasonable-rate analysis informs the first element of the inquiry, for as the *SOCM* court noted: "We do not propose . . . that all attorneys be remunerated at the same rate, regardless of their competence, experience, and marketability. We only aim to provide that their experience, competence, and marketability will be reflected in the rate at which they are in fact remunerated." [17] 857 F.2d at 1521 n.4.

Third, plaintiffs must produce data concerning the prevailing market rates in the relevant community for attorneys of reasonably comparable skill, experience, and reputation. This is undoubtedly a difficult assessment, and the Supreme Court has so acknowledged:

> We recognize, of course, that determining an appropriate "market rate" for the services of a lawyer is inherently difficult. Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill, and reputation, varies extensively—even within a law firm. Accordingly, the hourly rates of lawyers in private practice also vary widely.

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714 (5th Cir. 1974). *See Blum*, 465 U.S. at 893 (quoting S. REP. No. 1011, 94th Cong., 2d Sess. 6 (1976)). One of the several factors the court used to determine reasonable attorneys' fees in *Johnson* was the "experience, reputation, and ability of the attorneys." 488 F.2d at 718. And in *Blum*, the Supreme Court appeared to focus primarily on this factor. *See* 465 U.S. at 890 n.4 (noting years in which attorneys graduated from law school, years and general type of legal experience, and whether attorneys served as judicial law clerks); *id.* at 895 n.11 (noting lawyers' experience, skill, and reputation varies extensively).

[17] In *SOCM*, the court approved of the district court's use of the *Laffey* matrix, a schedule of hourly rates based largely on years of experience. *See SOCM*, 857 F.2d at 1525. Attorneys would have to state their federal court experience in order to get *Laffey* rates.

Blum, 465 U.S. at 895 n.11. However, as this court stated in *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982), "[t]he complexity of the market for legal services does not ... reduce the importance of fixing the prevailing hourly rate in each particular case with a fair degree of accuracy."

The Supreme Court's decision in *Blum* establishes the framework for analysis:

> To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate.

Blum, 465 U.S. at 896 n.11. The Court also noted that "rates charged in private representations may afford relevant comparisons." *Id.; see also Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) ("A reasonable attorney's fee under § 1988 is one calculated on the basis of rates and practices prevailing in the relevant market ... and one that grants the successful civil rights plaintiff a 'fully compensatory fee,' ... comparable to what 'is traditional with attorneys compensated by a fee-paying client.' ") (citations omitted).

In order to demonstrate this third element, plaintiffs may point to such evidence as an updated version of the *Laffey* matrix or the U.S. Attorney's Office matrix, or their own survey of prevailing market rates in the community. In *SOCM*, we approved of the district court's reliance, at least in part, on the schedule of prevailing rates compiled in *Laffey*. Although the *SOCM* court remanded the case to the district court for the limited purpose of making new findings as to reasonable hourly rates at the time the services were performed, it stated:

> We do not intend, by this remand, to diminish the value of the fee schedule compiled by the District Court

> in *Laffey*. Indeed, we commend its use for the year to which it applies. Perhaps the most desirable result of the present litigation would be the compiling of a similar schedule of prevailing community rates for other relevant years.

SOCM, 857 F.2d at 1525. Although fee matrices are somewhat crude—the *Laffey* matrix, for example, lumps attorneys with four to seven years of experience in the same category; attorneys with eleven to nineteen also share the same hourly rate [18]—the matrices do provide a useful starting point. To supplement any matrix that has been offered, plaintiffs may also provide surveys to update the matrix; affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases; and evidence of recent fees awarded by the courts or through settlement to attorneys with comparable qualifications handling similar cases.

"When . . . the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee contemplated by § 1988." *Blum*, 465 U.S. at 897. At this point, the defendant may challenge the plaintiffs' application for attorneys' fees, but the Government's burden in rebuttal is not without demands:

> Once the fee applicant has provided support for the requested rate, the burden falls on the Government to go forward with evidence that the rate is erroneous. And when the Government attempts to rebut the case for a requested rate, it must do so by equally specific countervailing evidence. Although there may be occasions in which the applicant's showing is so weak that the Government may without more simply challenge the rate as unsubstantiated, in the normal case the Government

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[18] In fact, the District Court in *Galloway v. Superior Court* noted its dissatisfaction with the *Laffey* matrix in this regard: "The Court accepts as credible evidence the Matrix, but nonetheless would hope that a more complete breakdown and study of rates could be compiled for future use in attorneys' fee awards." Civ. Action No. 91–0644, slip op. at 4 n.1.

> must either accede to the applicant's requested rate or provide specific contrary evidence tending to show that a lower rate would be appropriate.

Concerned Veterans, 675 F.2d at 1326.

Defendants may challenge any part of the prevailing parties' case for attorneys' fees. For example, defendants may challenge the plaintiff attorneys' claims that they charge reduced rates for non-economic reasons, and this might include a claim that under no circumstances would that particular plaintiff's attorney ever command the rates he or she requests. Defendants also may challenge the plaintiff attorneys' claims as to their competence, experience, reputation, or performance in the instant case. Finally, defendants may challenge plaintiff attorneys' market data, in an effort to show that the submitted market rates are inaccurate.

B. The Claims in this Case

Our review function in this case is limited, for district courts act with a real measure of discretion in granting a fee award under section 1988. *See Blum*, 465 U.S. at 902 n.19 ("A district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness."); *Kattan by Thomas v. District of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993) ("A district court's discretion as to the proper hourly rate to award counsel should not be upset absent clear misapplication of legal principles, arbitrary fact finding, or unprincipled disregard for the record evidence."); *Copeland v. Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980) (*en banc*) ("It is common learning that an attorney's fee award by the District Court will be upset on appeal only if it represents an abuse of discretion."). This limited standard of review is "appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

In this case, plaintiffs clearly met their burden and their requested rates were properly accorded a presumption of reasonableness. Plaintiffs submitted their counsels' declarations attesting that they charged below-market rates for non-

economic, public-spirited reasons.[19] Plaintiffs submitted data demonstrating their attorneys' experience in the legal profession and in litigating complex federal court cases, as well as information probative of their attorneys' skill and reputation. Finally, plaintiffs submitted a great deal of evidence regarding prevailing market rates for complex federal litigation. This included the *Laffey* matrix, the U.S. Attorney's Office matrix, affidavits attesting to increases in the market rates since the original *Laffey* matrix, and memorandum opinions in district court cases which relied on these matrices.

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[19] The dissenting opinion appears to challenge the District Court's findings that counsel in *Sexcius* and *Galloway* reduced their rates for non-economic reasons. However, the record clearly supports the District Court on this point.

Counsel in *Galloway* submitted an affidavit explaining that "[b]ecause my clients are unable to pay the rates prevailing in the community for complex federal litigation and are frequently unemployed, my rates vary from pure contingent fee to $200 per hour, and I rely to a great extent on court-awarded fees for my compensation." Second Affidavit of Vicki G. Golden, J.A. at III–50–51. The District Court determined that "[b]ecause this case involves both attorneys who practice privately and for profit but who give reduced rates to many clients, and attorneys who practice in public interest legal services organizations, *SOCM* is particularly relevant." *Galloway*, slip op. at 3, J.A. at III–14. The District Court found that "[plaintiffs' counsel] is exactly the type of private attorney who charges reduced rates to clients due to non-economic goals discussed in *SOCM*." *Id.* Counsel in *Sexcius* submitted an affidavit with similar explanations, stating that their "clients are unable to pay the rates prevailing in the community for complex federal litigation," and that they "charged plaintiffs a low hourly rate because their case was important and as teachers they could not afford the prevailing market rates." Declaration of Francine K. Weiss, J.A. at II–71. The District Court in *Sexcius* found that "[b]ecause plaintiffs' counsel charged plaintiffs this low $100 rate out of public interest motives, plaintiffs are entitled to collect the prevailing market rate, not merely the rate they actually charged plaintiffs." *Sexcius*, 839 F. Supp. at 921. This court does not disturb the factual findings of the district court when they are supported by the record.

The District, on the other hand, submitted little in rebuttal. First, the District attempted to challenge plaintiffs' requested hourly rates by suggesting that these rates were higher than the established billing rates of attorneys who litigate complex federal cases. In support, the District submitted a single declaration from an Assistant Deputy in its office recounting cases which, for the most part, were inapposite to the case at bar: attorneys in a majority of those cases never requested fees at prevailing market rates; nor did they suggest that they charged below-market rates for non-economic reasons; rather they simply sought the rates at which they typically billed clients. *See* Zielinski Declaration at 3–8, J.A. at I–219–24. One of the attorneys mentioned in Zielinski's declaration requested and received prevailing market rates in line with the *Laffey* matrix. *See id.* at 8, J.A. at I–224; *Fischbach v. District of Columbia*, Civ. Action No. 87–0646 (D.D.C. Jan 3, 1993), J.A. at I–254. Simply put, although the District does not bear the ultimate burden in this case, its evidence did not come close to rebutting the presumption of reasonableness plaintiffs established. The District Court therefore correctly "rel[ied] solely upon plaintiffs' unrebutted evidence." *Covington*, 839 F. Supp. at 900.

Second, the District attempted to argue that plaintiffs are only entitled to the rates they regularly charge, *i.e.*, that these rates are in fact the prevailing market rates. This argument was considered and rejected by this court in *SOCM*, and, therefore, merits little attention here. As the *SOCM* court stated, "[t]he result sought by plaintiffs, that is a fee award based on prevailing market rates rather than the actual rates of [plaintiffs' attorneys], is not only not inconsistent with the express intent of Congress, but rather accomplishes Congress' express goals."[20] 857 F.2d at 1521. Thus, the *en banc* court concluded: "Henceforth, the prevailing market rate method heretofore used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflect-

[20] In reviewing a case approved of in the Senate Report that accompanied the Civil Rights Attorneys Fee Award Act, the *SOCM*

ing non-economic goals." *Id.* at 1524. The District Court properly dismissed the District's argument that plaintiffs are only entitled to an award based on the fees their attorneys routinely charge clients.

Finally, the District argues that the court should define the relevant market, for purposes of determining the prevailing market rates, narrowly, as including only plaintiff attorneys in civil rights, employment, or discrimination actions. *Covington*, 893 F. Supp. at 897. The District Court rejected this narrow definition, noting that the District failed to show that a civil rights and employment discrimination market actually exists independent of attorneys who handle other types of complex federal litigation. *Id.* at 898 n.8. And even assuming, *arguendo*, the existence of such a submarket, the trial court found no evidence that submarket rates are lower than the prevailing rates in the broader legal market. *Id.* at 898. The District only weakly challenges this determination on appeal,[21] so we are hard-pressed to find even a compelling argument to address.

The Senate Report accompanying the enactment of section 1988 suggests that Congress envisioned rates to be set according to standards in other types of complex federal litigation: "It is intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases[,] and not be reduced because the rights may be nonpecuniary in nature." *Blum*, 465 U.S. at 893 (quoting

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court noted that "Congress did not intend to use historical billing rates as a cap on fee awards." *SOCM*, 857 F.2d at 1523 (quotations omitted).

[21] The District mentions in its brief that the market consists of those attorneys who litigate "employment discrimination and civil rights actions in the District of Columbia." Brief for the District of Columbia at 43. However, the point was not pressed in its briefs; nor did counsel attempt to argue the point when asked at oral argument about whether the District challenged the scope of the relevant market. In fact, counsel for the District suggested that this court need not reach that issue.

S. REP. No. 1011, 94th Cong., 2d Sess. 6 (1976)).[22] The point is that "Congress after all did not simply express its intent that the fees would attract counsel, but rather that they would be 'adequate to attract *competent* counsel.'" *SOCM*, 857 F.2d at 1521 (quoting S. REP. No. 1011 at 6).

In short, we can find no basis to overturn the District Court's determination that the relevant market is that of complex federal litigation.

III. CONCLUSION

For the foregoing reasons, we hold that the District Court did not abuse its discretion in awarding plaintiffs reasonable attorneys' fees in these consolidated cases.

So ordered.

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[22] Indeed, as noted by the Third Circuit, it makes little sense to narrow the market in the fashion suggested by the District in this case:

> Courts that try to establish public interest market rates by looking to the going rate for public interest work . . . do not examine an independently operating market governed by supply and demand, but rather recast fee awards made by previous courts into "market" rates. Courts adopting this micro-market approach, therefore, engage in a tautological, self-referential enterprise.

Student Pub. Interest Research Group v. AT&T Bell Laboratories, 842 F.2d 1436, 1446 (3d Cir. 1988).

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting:

The Supreme Court has made clear that federal fee shifting statutes "were not designed as a form of economic relief to improve the financial lot of lawyers." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986). The majority nonetheless affirms fee awards totalling nearly $664,000 in public funds calculated on the basis of premium hourly rates. I respectfully dissent because none of the plaintiffs has demonstrated as required by our previous opinions that the rates awarded prevail for the type of work performed or that the rates their lawyers have historically been able to secure from paying clients are not determinative of a "reasonable hourly rate." *Blum v. Stenson*, 465 U.S. 886, 888 (1984).

The majority recognizes that a fee applicant bears the burden of justifying the reasonableness of his requested hourly rate by showing "at least three elements: the attorneys' billing practices; the attorneys' skill, experience, and reputation; and the prevailing market rates in the relevant community." Maj. Op. at 12. In my view, however, it does not follow our precedent prescribing the evidence necessary to meet that burden with respect to at least two of the elements.[1] First, "[a]n applicant is required to provide *specific evidence* of the prevailing community rate *for the type of*

[1] I assume *arguendo* that the applicants meet the skill and experience requirements. I part from the majority insofar as it, unlike the district court, relies on special interest recognition within the applicants' limited area of practice to evaluate their experience. Maj. Op. at 5–6 & nn.4–8. I would suggest that broader assessment such as that reflected in law directory listings like, for example, the Martindale–Hubbell Law Directory provides more probative "pieces of evidence that will enable the District Court to make a reasonable determination of the appropriate hourly rate." *National Ass'n of Concerned Veterans v. Secretary of Defense* (*NACV*), 675 F.2d 1319, 1326 (D.C. Cir. 1982). The Martindale–Hubbell ratings are derived from confidential surveys of members of the bar and, significantly, the judiciary and "take[ ] into consideration experience, nature of practice and qualifications relevant to the profession." 4 Martindale–Hubbell Law Directory XI (1994).

work for which he seeks an award." *National Ass'n of Concerned Veterans v. Secretary of Defense* (*NACV*), 675 F.2d 1319, 1325 (D.C. Cir. 1982) (emphasis added); *see also Blum*, 465 U.S. at 896 n.11; *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980) (*en banc*) ("The reasonable hourly rate is that prevailing in the community for similar work."). The applicants have not met this burden because they rest their applications entirely on evidence of rates in the broad market of "complex federal litigation" that provides no basis for the district court [2] to determine the rate prevailing for the *specific* type of work performed by them.

The applicants chiefly rely on adjusted versions of the fee matrix developed more than ten years ago in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984); *cert. denied*, 472 U.S. 1021 (1985). We have not considered whether the broad *Laffey* matrix constitutes "specific evidence" of rates charged for "similar" [3] work performed irrespective of the nature of the litigation. In my view the *Laffey* matrix cannot do so where, as here, the litigation is of a discrete type that appears to generate its own range of rates. For example, as demonstrated by the evidence submitted by the District of Columbia (District), "the hourly rates ... in the *Laffey* matrix are substantially higher than the hourly rates charged by similarly experienced attorneys who litigate employment discrimination, civil rights and other types of damages actions in the courts of the District of Columbia." Joint Appendix (JA) I-218.[4]

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[2] Unless otherwise specified, the term "district court" refers to both district judges who decided the three fee awards consolidated on appeal.

[3] *NACV*, 675 F.2d at 1324.

[4] The data submitted with the District's affidavit indicate that the *Laffey* rates significantly overstate the non-reduced market rates charged to fee-paying clients for employment discrimination and other civil rights cases in the District of Columbia, sometimes by more than $100 an hour. *See, e.g.*, JA I-220-21, 243-44 (hourly rate of $150 compared to *Laffey* rates of $250 and $260); JA I-221-22,

In my view, the district court in *Covington* correctly outlined the *type* of specific evidence required to fulfill the burden prescribed by *NACV*:

> A *statistically reliable, well-documented, and extensive survey of the rates clients pay for a certain sub-market of legal services* would be powerfully persuasive. Such a survey would collect the rates of a statistically significant number of lawyers or firms within a legal sub-market, convincing the court that the survey's scope is broad enough to reflect the market faithfully. Such a survey would be sufficiently documented with supporting affidavits, assuring the court of the accuracy of the survey's data. Lastly, such a survey would encompass both the high rates that large, prestigious law firms in the area command for their work in the sub-market and the lower rates commanded by others for their work in the sub-market. (Ideally, the survey would also indicate what fraction of clients pay which rates within the sub-market's rate spectrum. That is, the survey would state what fraction of the sub-market's clients take their cases to high-priced firms, what fraction to low-priced firms, and what fraction to firms priced in the middle. This would help the court determine whether any given rate is typical or aberrant.)

Covington v. District of Columbia, 839 F. Supp. 894, 899 (D.D.C. 1993) (emphasis in original).

Where the district court committed error, however, was in placing the burden of proof on *the District*, not the appli-

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247–48 (hourly rate of $150 compared to *Laffey* rates of $290 and $300). If the $150 figure accurately estimates the prevailing community rate for this litigation specialty, the bulk of the awards here is based on hourly rates overstated by more than $100 per hour. The difference amounts to more than $109,000 in additional fees for Schember and Gaffney, *see Covington v. District of Columbia*, 839 F. Supp. 894, 903 (D.D.C. 1993) (996 hours at $260 per hour) and more than $100,000 in additional fees for Weiss and Barnett, *see Sexcius v. District of Columbia*, 839 F. Supp. 919, 929 (D.D.C. 1993) (912 hours at $260 per hour).

cants.[5] Because *the applicants* have failed to submit evidence that carries their burden under *NACV*, the fee awards are in my view based on a "clear misapplication of legal principles" requiring reversal. *Kattan by Thomas v. District of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1398 (1994). Although the majority affirms the district court's reasoning that the applicants are nonetheless entitled to the matrix-based rates they claim simply because "[t]he District . . . submitted little in rebuttal," Maj. Op. at 19,[6] the sufficiency of the District's rebuttal is relevant only if the applicants first meet *their* burden.

Second, in *Sexcius* and *Galloway*, the district court did not give full effect to our precedent requiring it to consider the rates customarily charged by counsel to their paying clients for whom they have *not* reduced their rates in the public interest. The court in *NACV* explained

> counsel for applicants may be required to submit specific evidence of his or her actual billing practice during the

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[5] Nothing in *Save Our Cumberland Mountains, Inc. v. Hodel* (*SOCM*), 857 F.2d 1516 (D.C. Cir. 1988) (*en banc*), altered either the burden of proof imposed by the court's earlier opinions or who bears it. Indeed, the court expressly noted that "[h]enceforth, the prevailing market rate method *heretofore used in awarding fees* to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals." *Id.* at 1524 (emphasis added). Although the court "commend[ed]" the use of the *Laffey* matrix in that case without evaluating it in any detail, *id.* at 1525, it bears note that *SOCM* involved a fee award under the Surface Mining Control and Reclamation Act. *Id.* at 1517. Fee awards under that statute are undoubtedly so few in number, at least compared with the type of litigation involved here, that use of the broad *Laffey* matrix may be by default the most accurate evidence of a reasonable hourly rate.

[6] *See Covington*, 839 F. Supp. at 897; *Sexcius v. District of Columbia*, 839 F. Supp. 919, 923 (D.D.C. 1993); *Galloway v. Superior Court of the District of Columbia*, Civil Action No. 91–0644, Mem. Op. at 5 (D.D.C. Apr. 21, 1994) (*reprinted in* JA III–12, III–16).

> relevant time period, if in fact applicant has a billing practice to report. This information, when available, will provide important substantiating evidence of the prevailing community rate.... Accordingly, *the actual rate that applicant's counsel can command in the market is itself highly relevant proof of the prevailing community rate.*

675 F.2d at 1326 (emphasis added, footnotes omitted). In *Sexcius*, counsel attested to a maximum quoted rate of $187.50 per hour. JA II–71. In *Galloway*, counsel indicated that the maximum rate she had been able to command was $200 per hour. JA III–51. Neither indicated that those rates had been reduced for non-economic reasons. Although the court in *SOCM* held that a lawyer in private practice who reduces his customary rate is not normally limited to that reduced hourly rate in fee awards, the *SOCM* court did not alter the significance under *NACV* of the full, *non-reduced*, rate charged by counsel to other clients.[7]

Together, *NACV* and *SOCM* instruct that a lawyer's usual hourly rate remains the most probative evidence of a reasonable rate to award him under a fee-shifting statute unless that rate does not fairly reflect the value of his services because it is a "reduced rate[ ] reflecting non-economic goals." *SOCM*, 857 F.2d at 1524; *see also NACV*, 675 F.2d at 1326; *Goos v. National Ass'n of Realtors*, 997 F.2d 1565, 1569 (D.C. Cir. 1993); *Kattan*, 995 F.2d at 278 (noting "an attorney's usual billing rate is presumptively the reasonable rate"). Resort to a matrix to determine a reasonable rate is thus appropriate only if a lawyer's *ordinary* rate is so reduced; and, if so used,

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[7] I do not question the evidence indicating that some of the lawyers in these cases have reduced their rates for non-economic reasons both in the past and here. I do dispute, however, that a lawyer's billing history can be disregarded in favor of a rate that he has *never* commanded. For example, a lawyer who normally charges $120 per hour to paying clients but agrees to reduce that rate to $100 per hour for non-economic reasons would not, in my view, be entitled under *NACV* or *SOCM* to recover a market rate of $150 per hour.

the matrix must be based on "specific evidence" of "the type of work" for which the lawyer seeks an award. *NACV*, 675 F.2d at 1325.

I would reverse the district court's conclusion that leapfrogged over the applicants' burden and declared instead that *the District* had failed to meet its burden, thereby leaving it, in its view, no alternative but to grant the applicants' requests. *See, e.g., Covington*, 839 F. Supp. at 898. Fee applicants are required to do more than simply ask for an award authorized by statute; they must meet a factually demanding burden. The record contains no evidence that the maximum rates previously charged by the *Sexcius* counsel and by Golden in *Galloway* had been so reduced, making their customary rates the presumptive bases for fee awards to them. *Goos*, 997 F.2d at 1568–69; *Kattan*, 995 F.2d at 278. There is, however, insufficient evidence to evaluate the claims of the other lawyers and law students who participated in the consolidated cases.[8] Accordingly, I would remand to the district court to determine whether each counsel has established a customary, non-reduced rate; if so, that rate should provide the basis of a fee award. I would further instruct the district court to determine a reasonable hourly rate for those lawyers who have not established such a rate. Its determination should be made on the basis of detailed evidence of the type it has already described so well. *Covington*, 839 F. Supp. at 899.

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[8] Although the district court in *Covington* concluded that the District had produced insufficient evidence that counsel's ordinary billing rate of $150 per hour was below market value, 839 F. Supp. at 897, that conclusion was premised on the incorrect market of "complex federal matters," *id.* at 898.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DARRYL COVINGTON, *et al.*, Plaintiffs,	)	FILED December 13, 1993
v.	)	Civil Action No. 87-2658 (RCL)
DISTRICT OF COLUMBIA, *et al.*, Defendants.	)	

MEMORANDUM OPINION

This case comes before this court on plaintiffs' motion for an award of attorney's fees under 42 U.S.C. § 1988, the Civil Rights Attorney's Fee Award Act of 1976. Having considered the extensive pleadings and evidence of both parties, this court shall grant plaintiffs' motion.

I. BACKGROUND

The case underlying this attorney's fee litigation was brought by ten inmates of the District of Columbia's correctional facility at Lorton. The inmates alleged that while shackled and handcuffed, they were severely beaten by correctional officers in October 1986. Nine of the inmates further alleged that prison authorities found them guilty of misconduct and sent them to a maximum security facility without proper hearings.

The inmates, who could not afford legal fees, were represented by counsel who took their case on a contingent fee basis. Mr. Daniel Schember and Mr. Michael J. Gaffney of the law firm of Gaffney & Schember, P.C., were lead counsel for plaintiffs. They were aided by Ms. Linda Delaney, a solo

practitioner who participated in discovery, trial preparation and trial; Professor Mark Hager, a professor at American University's Washington College of Law who researched legal questions and identified and interviewed witnesses; Georgetown University Law Center graduates Mr. Darryl Joe and Ms. Tess Ferrera; and law students from American University's Washington College of Law who worked under Mr. Schember's supervision.[1/]

Plaintiffs' counsel handled very well this complicated federal case, which involved the constitutional claims of ten plaintiffs against sixteen defendants, lengthy discovery, many motions and a jury trial. Counsel won partial summary judgment for the nine plaintiffs sent to the maximum security facility, won judicial sanctions against defendants for their failure to respond to requests for admissions and related interrogatories, and took full advantage of certain key facts that defendants were forced to concede. After trial, the jury found for all plaintiffs against all defendants on all issues tried.

After the court denied defendants' motion for judgment notwithstanding the verdict, defendants appealed. The parties settled while the appeal was pending. Under the settlement, defendants paid each plaintiff $25,000 and conceded that plaintiffs were prevailing parties for the purposes of § 1988.

After settling the underlying litigation, the parties negotiated an interim agreement on attorney's fees, approved by this court by an Agreed Order dated December 20, 1991. In the Agreed Order, the parties stipulated as to the number of hours

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[1/]Plaintiffs are not seeking compensation for the work of Mr. Tom Mack, a lawyer then from the firm of Lyons, Mack & Delaney, even though he helped try *Covington*. Mr. Mack's time was traded off in fee negotiations with defendants.

plaintiffs' counsel reasonably spent on the case, and settled plaintiffs' claim for legal expenses incurred up to the date of the Agreed Order.

The parties did not resolve, however, the hourly rates at which counsel should be compensated. Under the Agreed Order, counsel accepted $125-150 per hour -- the rates plaintiffs' counsel ordinarily charged paying clients[2/] -- from defendants for the interim, without conceding that that rate was all that was due. Also unresolved in the Agreed Order was whether defendants must compensate plaintiffs for the market value of the hours reasonably expended by the law students.

The Agreed Order stayed further proceedings in this case pending the Supreme Court's resolution of the issue of contingency fee enhancements.[3/] Because the Supreme Court has since resolved that issue in *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992), plaintiffs now seek a final award of attorney's fees.

The issue now before this court is the amount of attorney's fees to which counsel are entitled. Specifically, this court must decide what the reasonable hourly rate for plaintiffs' counsels' legal services is, whether plaintiffs may recover fees for the stipulated time of the law students who worked on this case, whether plaintiffs should receive current or historic

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[2/]The rate Prof. Hager received under the Agreed Order is an exception. Because Prof. Hager lacks any billing history, his $150 per hour interim rate was reached by negotiations between the parties.

[3/]At the time of the Agreed Order, a petition for writ of certiorari in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (*en banc*) (denying contingency fee enhancements), was pending in the Supreme Court. The Supreme Court has since denied certiorari. *See King v. Ridley*, 112 S. Ct. 3054 (1992).

rates, and whether plaintiffs are entitled to fees for this fee litigation.

II. ATTORNEY'S FEES

A. Counsel

1. Reasonable Hourly Rate

The most difficult issue in this case is establishing the reasonable hourly rate. In § 1988 cases, "the initial estimate of a reasonable attorney's fee" -- the so-called lodestar fee -- "is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. Adjustments to that fee then may be made as necessary in the particular case." *Blum v. Stenson*, 465 U.S. 886, 888 (1984) (citations omitted). The parties in this case have already stipulated as to the number of hours counsel have reasonably worked on this litigation, and plaintiffs are not seeking any enhancement of the lodestar figure. Thus, the central contested issue in this case is the calculation of a reasonable hourly rate.

Calculating the reasonable hourly rate of lawyers in purely commercial law firms is relatively easy. The reasonable hourly rate of lawyers in purely commercial law firms is presumed to be the rate such lawyers charge paying clients for similar services, within certain parameters. *See Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 24-25 (D.C. Cir. 1984), *overruled in part on other grounds, Save Our Cumberland Mountains, Inc. v. Hodel* [*SOCM*], 857 F.2d 1516, 1520 (D.C. Cir. 1988) (*en banc*). Calculating the reasonable hourly rate of lawyers who lack established billing histories is more difficult. Lawyers working in private legal aid organizations, for example, often do not receive fees for their legal work and

thus necessarily lack any billing history that could serve as their presumptively reasonable rate; for them, a district court must determine the "prevailing market rates in the relevant community," and award counsel that as the reasonable hourly rate. *Blum*, 465 U.S. at 895. In the D.C. Circuit, this latter method of calculation is also used to determine the attorney's fees owed to "privately practicing but public interest motivated attorneys who intentionally charge their poorer clients reduced rates." *SOCM*, 857 F.2d at 1520.

Plaintiffs' counsel argue that they are privately practicing attorneys who charge some of their poorer clients reduced rates out of public interest motives, and defendants have failed to disprove that.[4/] Defendants have not challenged plaintiffs' declarations showing that Gaffney & Schember, P.C., has a history of handling civil rights and civil liberties cases either without charge or at "below-market rates" for non-economic reasons. Nor have defendants countered plaintiffs' evidence that Ms. Delaney similarly charges reduced rates for her legal work out of public interest motives. Most significantly, defendants have not produced enough evidence to show that plaintiffs' counsels' ordinary billing rates -- about $150 per hour -- are not below market value. (This failure is discussed below.) Because plaintiffs' assertions that their counsel have taken public interest cases for below-market rates are reasonably well-documented and virtually unchallenged, this court will take plaintiffs at their word. As public interest but private practice lawyers, plaintiffs' counsel are entitled to receive prevailing market rates for their services. *See SOCM*, 857 F.2d at 1524.

[4/] Instead of contesting the public interest orientation of Gaffney & Schember, P.C., or any of plaintiffs' other legal advisors, defendants have challenged the wisdom of the *SOCM* court's *en banc* decision to trust district courts to weigh the credibility of a fee applicant's affidavit of public interest motivation.

a. Definition of the Relevant Market

As public interest but private practice lawyers, plaintiffs' counsel are clearly entitled to the rates "prevailing in the *relevant* market, *i.e.*, 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (quoting *Blum*, 465 U.S. at 896 n.11) (emphasis added). However, the parties disagree as to which market of legal services is the "relevant market" in this case.

Defendants argue that the relevant market should be narrowly defined as that market of lawyers who represent plaintiffs in civil rights, employment, or discrimination actions. According to defendants, plaintiffs' counsel are entitled to no more than the (allegedly low) fees prevailing in this narrowly defined sub-market of legal services.

Plaintiffs, by contrast, argue that the relevant market should be more broadly defined as the market of lawyers who handle all kinds of complicated federal litigation. This broader market encompasses every complicated federal case handled by District of Columbia lawyers, including not only the small sub-market of lawyers who file civil rights, discrimination, or employment suits but also the sub-market of lawyers who litigate antitrust matters, the sub-market of lawyers who file and defend class actions, etc. Plaintiffs argue that they are entitled to the high fees commanded by lawyers in this broader market.

Defendants' position may be plausible. Although no District of Columbia federal court appears to have spoken squarely on the issue of sub-markets, the legislative history of

§ 1988[5/] and subsequent Supreme Court[6/] and District of Columbia circuit[7/] caselaw construing attorney's fee statutes make clear that in resolving any particular attorney's fee question under § 1988 (including this sub-market question), courts must aim to award attorney's fees that mirror what counsel would earn in the market. If the market would provide different sub-markets[8/] of lawyers different rates, courts properly aiming to mirror the market would award lawyers in each sub-market the fees that their particular services command in the marketplace.

However plausible defendants' theory may be, ruling on its merits will have to wait for another, better litigated case.

[5/] Senate Report No. 94-1011 (1976) indicates that in enacting § 1988, Congress intended attorney fee awards to reflect the prevailing rates that counsel could have earned in the legal market. *See Blum*, 465 U.S. at 893 (citing S. Rep. No. 94-1011, p.6 (1976)).

[6/] In calculating attorney's fees under § 1988, the Supreme Court has "consistently looked to the marketplace as [its] guide to what is 'reasonable.'" *Jenkins*, 491 U.S. at 286.

[7/] The District of Columbia Circuit has long recognized that under fee-shifting statutes, attorneys should be compensated "for the market value of services rendered." *Copeland v. Marshall*, 641 F.2d 880, 894 (D.C. Cir. 1980) (*en banc*).

Further, some District of Columbia caselaw appears to support defendants' sub-market theory more specifically. The Copeland court held that the reasonable hourly rate to be awarded under fee-shifting statutes is the rate "prevailing in the community *for similar work*." *Copeland*, 641 F.2d at 892 (emphasis added). *See also SOCM*, 857 F.2d at 1521 (finding congressional intent to award "rates commensurate with prevailing community standards of attorneys of like expertise *doing the same sort of work in the same area*.") (emphasis added).

[8/] Defendants have not convinced this court that lawyers handling civil rights, employment, or discrimination cases for plaintiffs constitute a sub-market of their own. Perhaps a better defined sub-market would include lawyers handling civil rights, employment, or discrimination cases for private defendants, as well.

Defendants have not produced enough evidence in this case to persuade this court that the prevailing rate in the sub-market of plaintiffs' lawyers handling civil rights, employment, and discrimination cases is -- as defendants claim -- lower than the rate prevailing in the broader legal market. Without this evidence, embracing defendants' theory would be mere dicta since this court could not have applied defendants' theory to this case. Perhaps this court will have the chance to reconsider defendants' theory in a future case in which the party opposing fees produces a more thorough evidentiary record.

Unlike defendants, plaintiffs in this case have presented sufficiently persuasive evidence charting the prevailing market rates of litigators of complex federal matters. Plaintiffs' chief evidence is a pair of court-approved matrices. The first of these matrices is an updated *Laffey* fee matrix that has been relied upon, at least in part, by six District of Columbia district judges[9/] and that has received a degree of approval from the Court of Appeals for the District of Columbia Circuit.[10/] The second matrix is one developed by the U.S. Attorney's Office for the District of Columbia that the U.S.

[9/] *See Fischbach v. District of Columbia*, CV 87-646 (D.D.C. Jan. 4, 1993) (Penn, J.); *Robles v. United States*, CV 84-3635 (D.D.C. Jan. 10, 1992) (Flannery, J.); *Trout v. Ball*, 705 F. Supp. 705, 709 n. 10 (D.D.C. 1989) (Harold Greene, J.); *Palmer v. Barry*, 704 F. Supp. 296, 298 (D.D.C. 1989) (Oberdorfer, J.); *Thompson v. Barrett*, 599 F. Supp. 806, 814 (D.D.C. 1984) (Richey, J.); *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 371-75 (D.D.C. 1983) (Robinson, J.), *aff'd*, 746 F.2d 4 (D.C. Cir. 1984), *rev'd on other grounds, SOCM*.

[10/] *See SOCM*, 857 F.2d at 1525 (commending use of *Laffey* matrix). *See also Goos v. National Association of Realtors*, 997 F.2d 1565, 1568 (D.C. Cir. 1993) (*dicta* implying that the *Laffey* matrix is "the schedule (or matrix) of prevailing community rates [that has been] adopted in this circuit.").

The *Laffey* matrix is set forth in Appendix A.

Attorney relies upon in settlements.[11/] Defendants' blunderbuss criticisms of plaintiffs' matrices -- as representing only a small percentage of the District of Columbia's Bar, and as omitting the "lower end of the market" of legal services -- may have merit, but standing alone these criticisms are insufficient to undermine plaintiffs' evidence. *See Nat. Ass'n of Concerned Vets. v. Sec. of Defense*, 675 F.2d 1319, 1337-38 (D.C. Cir. 1982) (Tamm, J., concurring).

For their own part, defendants have not presented persuasive evidence that the fees earned by plaintiffs' lawyers in the sub-market of civil rights, employment, and discrimination litigation are lower than the fees earned in the broader market of complicated federal litigation. Defendants' sole affidavit, sworn by Michael E. Zielinski, Assistant Deputy Corporation Counsel, Civil Division (Defs.' Opp'n Ex. B), offers insufficient evidence of this contention. For example, to challenge the rates of plaintiffs' lead counsel, Zielinski's affidavit cites only seven instances in which lawyers with 10-20 years of experience charged about $150 per hour in representing plaintiffs in civil rights, employment, or discrimination matters. Standing alone, these seven instances are insufficient to demonstrate that $150 per hour is the prevailing rate across the District of Columbia in this sub-market. *See Concerned Veterans*, 675 F.2d at 1325 (parties opposing fee awards have burden of rebutting evidence favoring high fees with "equally specific countervailing evidence . . . tending to show that a lower rate would be appropriate."). *See also id.* at 1337-38

[11/] In the joint stipulation of settlement in *Hodge v. Kemp*, CV 92-1183 (SS) (May 18, 1992) (Pls.' Ex. 27 at ¶3), defendants -- who were represented by the U.S. Attorney's Office -- stated that the U.S. Attorney's Office's matrix sets forth the "prevailing rates in this community."

The matrix prepared by the United States Attorney's Office is set forth in Appendix B.

(Tamm, J., concurring). These seven instances look suspiciously representative of only the lower end of the sub-market. Just because some lawyers are willing to take some civil rights, employment, or discrimination cases at low-end rates of $125 to $150 per hour, does not establish $125 to $150 per hour as the prevailing market rate for the entire sub-market. Defendants have failed to proffer evidence of the high end, as well as the low end, of the range of rates commanded by very experienced counsel in their proposed sub-market.

Defendants' evidence of the rates of those who aided lead counsel in *Covington* is no more persuasive. To establish the prevailing market rates of Ms. Delaney and Prof. Hager, both lawyers of 4-7 years experience, defendants' evidence consists of a single billing rate: Ms. Delaney's. This court cannot assume that a single attorney's billing rate happens to equal the rate prevailing for the work of similar attorneys in the city-wide sub-market of civil rights, employment, and discrimination cases. To establish the prevailing market rates of plaintiffs' counsels' law graduates, Mr. Joe and Ms. Ferrera, defendants point only to one District of Columbia firm that billed its paralegals at $20 per hour (Zielinski Decl. at ¶11) and to another District of Columbia firm -- Gaffney & Schember -- that billed its law graduates' time at $40 per hour. Again, these two instances are insufficient evidence that across the District of Columbia the prevailing market rate for law graduates' work in defendants' proposed sub-market is $20-40 per hour.

In future cases, parties opposing fee awards might come forward with more persuasive evidence. *A statistically reliable, well-documented, and extensive survey of the rates clients pay for a certain sub-market of legal services* would be powerfully persuasive. Such a survey would collect the rates of a statistically significant number of lawyers or firms within

a legal sub-market, convincing the court that the survey's scope is broad enough to reflect the market faithfully. Such a survey would be sufficiently documented with supporting affidavits, assuring the court of the accuracy of the survey's data. Lastly, such a survey would encompass both the high rates that large, prestigious law firms in the area command for their work in the sub-market and the lower rates commanded by others for their work in the sub-market. (Ideally, the survey would also indicate what fraction of clients pay which rates within the sub-market's rate spectrum. That is, the survey would state what fraction of the sub-market's clients take their cases to high-priced firms, what fraction to low-priced firms, and what fraction to firms priced in the middle. This would help the court determine whether any given rate is typical or aberrant.)

Parties seeking fees for legal services performed in a lucrative sub-market -- in the antitrust sub-market, for example -- might proffer a statistically reliable, well-documented, and extensive survey of that sub-market's rates in order to show that in the marketplace, their counsels' work commands high fees. Parties opposing excessive fee awards for work performed in a less lucrative sub-market might proffer a statistically reliable, well-documented, and extensive survey of that sub-market's rates to establish that in the marketplace, counsel would have commanded only a modest fee.

In the present case, however, the record is too meager; defendants have simply not produced enough evidence that the prevailing market rate for the proposed sub-market of plaintiffs' civil rights, employment, and discrimination lawyers is only $150 per hour. Because defendants have not carried their evidentiary burden, this court cannot rule for defendants. Because this court cannot rule for defendants, for today plaintiffs' theory that the relevant market should be very

broadly defined still stands. Because plaintiffs have met their evidentiary burden under that theory -- and because defendants' factual rebuttal of plaintiffs' evidence has been ineffectual -- plaintiffs shall be awarded the prevailing market rates for their services in the broadly defined market of complicated federal litigation. This court now turns to the determination of those rates.

b. Prevailing Market Rates for Complicated Federal Litigation

In performing the difficult task of calculating the prevailing market rates for attorney's fees, this court by necessity relies upon the evidence of the prevailing market rates that the parties have produced. *Cf. Concerned Veterans*, 675 F.2d at 1323-24 (noting that attorney's fee cases impose a "difficult burden" on a district court and "correspondingly heavy" evidentiary burdens on fee applicants). In the present case, only plaintiffs have produced sufficient evidence of the prevailing market rates; defendants have produced little persuasive countervailing evidence. In future cases, this court hopes to base its calculations on statistically reliable, well-documented, and extensively surveyed evidence of the sort described above. In the meantime, this court is forced to rely solely upon plaintiffs' unrebutted evidence.

i. Mr. Gaffney and Mr. Schember

The *Laffey* fee matrix and the U.S. Attorney's Office's matrix both award the same 1992-93 rate -- $260 per hour -- to lawyers with Mr. Gaffney's and Mr. Schember's 11-19 years of experience. The *Laffey* matrix charts fees only up to 1988-89 (*see* Appendix A), but plaintiffs have updated the *Laffey* matrix's 1988-89 rates by adopting the extrapolation method employed by the district court in *Robles v. United*

States of America, No. 84-3635 (D.D.C. Jan. 10, 1992). In *Robles*, the district court updated the *Laffey* matrix by adding $10 per hour to the 1988-89 hourly rate of $220 and to the hourly rates of each succeeding year. *See Robles*, slip op. at 16 & n.7. Plaintiffs have followed the *Robles* approach, adding $10 raises to each year after 1988-89 to calculate a current (1992-93) rate of $260 per hour. (Pls.' Application, at 23.)

The U.S. Attorney's Office's matrix also awards counsel with 11-19 years of experience a rate of $260 per hour for 1992-93. The U.S. Attorney's Office extrapolates its matrix by adding the Consumer Price Index increase for the Washington, D.C., metropolitan area to the prior year's rate, and rounding upwards if the sum is within $3 of the next $5 multiple. (*See* Appendix B, Methodology Note.) Given a Consumer Price Index rate of 3.4 percent, the U.S. Attorney's Office's matrix would award a 1992-93 rate of $260 per hour.

ii. Ms. Delaney and Prof. Hager

Plaintiffs' most up-to-date information on the rates of lawyers with Ms. Delaney's and Prof. Hager's 4-7 years of experience comes from the U.S. Attorney's Office matrix. The *Laffey* fee matrix charts fees only up to 1989.[12/] (*See* Appendix A.) The U.S. Attorney's Office matrix, by contrast, charts fees up to 1992. (*See* Appendix B.) For 1991-92, which is the latest year reported in the U.S. Attorney's Office's matrix, the fee for lawyers of 4-7 years of experience is $165 per hour. Plaintiffs request only $160 per hour for the work of Ms. Delaney and Prof. Hager.

[12/] Although *Robles* updates the *Laffey* matrix's rates for lawyers with 11-19 years of experience, it does not update the rates for lawyers with 4-7 years of experience. *See Robles*, slip op. at 16.

iii. The Law Graduates

If plaintiffs had requested the most current rate in this more current matrix, they could have claimed $125 per hour -- the 1991-92 rate recorded in the U.S. Attorney's Office's matrix -- for the work of their law graduates. Instead, plaintiffs have requested only $85 per hour for their law graduates' time. This court will assume that some factor apparent to plaintiffs justifies the modesty of this request. *Cf. Sierra Club v. E.P.A.*, 769 F.2d 796, 812 (D.C. Cir. 1985).

Because plaintiffs' matrices stand as virtually unrefuted evidence, and because plaintiffs have employed rational methods of updating this evidence to calculate current market rates, this court will award plaintiffs the fees they have requested for Mr. Gaffney, Mr. Schember, Ms. Delaney, Prof. Hager, and the law graduates.

B. Law Students

The next issue this court must address is whether the time spent by law students working for plaintiffs' counsel on *Covington* is compensable under § 1988. For their work on *Covington*, the law students were paid not by salary, but by the promise of a fee contingent upon plaintiffs prevailing on the merits. The parties dispute whether § 1988 permits plaintiffs to claim fees for the time expended by law students who are paid by a contingent fee.

The reasonable hours expended by law students may be compensated under § 1988 only if it is the "prevailing practice" in the District of Columbia's legal market to bill paying clients for such work. *Jenkins*, 491 U.S. at 287. Both parties agree that in the ordinary § 1988 case -- that of a law firm

that pays its law students a salary (even a below-market salary) -- a law firm need only prove what the prevailing market rate is in order to collect that rate for its law students. *See, e.g., In re Donovan*, 877 F.2d 982, 993, 997 (D.C. Cir. 1989) (per curiam); *In re Olson*, 884 F.2d 1415, 1426 (D.C. Cir. 1989) (awarding compensation for time spent by salaried law clerks). The parties disagree on whether this unusual case -- that of lawyers who pay law students a contingent fee -- differs from the ordinary case in degree or in kind.

Plaintiffs argue that it differs only in degree. According to plaintiffs, a contingent fee is like a salary (perhaps a below-market salary). A law student paid by contingent fee is thus just like a law student paid by salary. In either case, counsel need only establish the prevailing market rate for law students in order to recover it under § 1988. Plaintiffs' matrices, which show the prevailing market rates for law students' labor, meet that evidentiary burden.

Defendants, by contrast, argue that the present case differs in kind from the ordinary case. While defendants recognize that the time of *salaried* law students is commonly billed to paying clients, defendants argue that law students *paid by contingent fee* are another matter entirely. Plaintiffs cannot simply assume that the prevailing practice in the District of Columbia is to bill the hours of law students who are paid by contingent fee in the same way that the hours of salaried law students are billed. Rather, plaintiffs must carry the additional burden of proving that law students paid by contingent fee are commonly billed to paying clients (as well as the ordinary burden of determining what that market value is). Because plaintiffs have failed to establish that it is the prevailing practice to bill paying clients for the work of law students paid by contingent fee, defendants argue that they are not liable for any of the hours expended by the law students.

Plaintiffs' theory is correct in this Circuit. In *Jordan v. United States Dept. of Justice*, 691 F.2d 514, 523-24 (D.C. Cir. 1982), this Circuit found that unpaid law students are different only in degree, not kind, from paid law students for the purposes of fee-shifting statutes. In *Jordan*, the court held that the work of unpaid law students should be compensated at prevailing market rates, rejecting the argument that the law students could recover only the cost of their labor (which is zero when law students work for free). In a decision crucial to this case, the *Jordan* court found that the plaintiffs' sole burden was to establish the "market value of [the law students'] services"; the court did not impose upon plaintiffs the additional burden of proving that the prevailing practice is to bill paying clients for the labor of unpaid law students. *Jordan*, 691 F.2d at 524. Because this Circuit has declined to impose that additional burden on plaintiffs who seek compensation for unpaid law students, this court declines to impose that additional burden on plaintiffs who seek compensation for law students paid by contingent fee.[13/]

Since plaintiffs' matrices have carried plaintiffs' sole burden of establishing the prevailing market rates for law students in the District of Columbia, plaintiffs may collect the prevailing market rate for their law students' time.

Plaintiffs seek compensation for the 347.20 hours[14/] of law student time at the prevailing market rate for law student work on complicated federal litigation, which they claim to be

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[13/]Although *Jordan* predates by years the *Jenkins* Court's requirement that plaintiffs prove that it is the prevailing practice to bill paying clients for law student labor, nothing in *Jenkins* alters the *Jordan* court's view of unpaid and paid law students as different only in kind not degree.

[14/]The parties have already stipulated as to the number of hours the law students reasonably spent on this case.

$70 per hour. Plaintiffs' most current data evidencing the prevailing market rate of law students comes from the U.S. Attorney's fee matrix. (As discussed above, the *Laffey* fee matrix charts fees only up to 1989; the U.S. Attorney's Office's matrix charts fees up to 1992.) Because plaintiffs' evidence is practically unrefuted, and because their fee request is based upon their most current data, this court will award plaintiffs the $70 per hour rate requested for the work of their law students.

C. Current Rates

To compensate for the delay in the payment of their attorney's fees, plaintiffs ask that the final fee award -- both for counsel and for the law students who worked on the case -- be based on current rates rather than historic rates. That is, plaintiffs request prevailing market rates earned by lawyers today, rather than the rates that prevailed in the market when counsel actually worked on *Covington*.

This court clearly has the authority to grant plaintiffs either current or historic rates. Ordinarily, district courts should award historic rates by "simply matching the billing rate governing a particular period to the hours reasonably expended that period." *Laffey*, 746 F.2d at 20 n.104. However, to roughly compensate for delay in payment, a district court has the authority to award current market rates instead of historic market rates,[15] so long as the use of current instead of historic rates would not overcompensate counsel, "generating a windfall for the plaintiff's attorneys."[16]

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[15] *See, e.g., Jenkins*, 491 U.S. at 284; *Laffey*, 746 F.2d at 20 n.104.

[16] *Murray v. Weinberger*, 741 F.2d 1423, 1433 (D.C.Cir. 1984).

Generally, to collect current rates plaintiffs must show that the delay in fee payment has produced some degree of hardship such that an award of current rates does not produce a windfall. However, in the present case defendants appear to have conceded plaintiffs' right to receive current rates for work done years ago. By failing to request production for this court of an annual breakdown of the number of hours that plaintiffs' counsel expended on *Covington*, defendants have made it impossible for this court to award historic rates. It is impossible to compute the fee counsel would have earned in the market each year -- *i.e.*, the historic rates -- without knowing how many hours plaintiffs' counsel expended in each year of the *Covington* litigation. Defendants could have discovered this information from plaintiffs by filing with this court a motion for leave to conduct discovery necessary to file its brief in opposition. By failing to provide this court with the information necessary for it to award historic rates, defendants appear to have conceded plaintiffs' right to current rates. Accordingly, this court will award plaintiffs current rates for all hours expended on the underlying litigation of *Covington*.

D. Fees for Fee Litigation

The final issue before this court is whether plaintiffs' counsel are entitled to fees for litigating this fee petition. Plaintiffs have provided detailed records for Mr. Gaffney (Gaffney Decl. at App. Ex. D (claiming 62.7 hours)); Mr. Schember (Schember Decl. at ¶12 (claiming 12.1 hours)); and a law clerk (Gaffney Decl. at App. Ex. E (claiming 27.6 hours)) recording time reasonably spent on this fee litigation as of the date of the motion for fees.

Plaintiffs are entitled to compensation from defendants for all hours reasonably expended on this fee petition. *See Sierra*

Club, 769 F.2d at 811; *Environmental Defense Fund v. EPA*, 672 F.2d 42, 62 (D.C. Cir. 1982). Because defendants have conceded the reasonableness of the hours claimed in the original motion, and because plaintiffs' counsels' declarations regarding these claimed hours are sufficiently detailed, this court will not independently scrutinize the hours claimed. Instead, this court will assume that when the number of hours is uncontested, some factor apparent to the parties justifies the number of hours counsel claims. *See Sierra Club*, 769 F.2d at 812.

Although defendants concede that the claimed time expended on this fee litigation is a reasonable amount, defendants dispute their liability for that time. Defendants contend -- without citing any statutory provision or case law in support -- that if plaintiffs do not "prevail[]" on their request for attorney's fees, plaintiffs may not be awarded attorney's fees for the fee litigation. Even under defendants' novel theory, plaintiffs still could collect fees for this fee litigation. Plaintiffs are indeed prevailing on their motion for fees *per* this memorandum opinion. Plaintiffs' counsel are entitled to a reasonable hourly rate for all the hours they claim they have reasonably expended on the fee litigation itself.

This court also grants plaintiffs leave to submit a supplemental motion to request compensation for reasonable time spent on this fee litigation since the filing of the original motion.

III. CONCLUSION

For litigating the merits of *Covington*, plaintiffs are awarded fees in accordance with the chart below:

Attorney	*Hours*	*Prevailing Market Rate*	*Amount*
Schember	930.64	$260 per hour	$241,966.40
Gaffney	65.70	$260 per hour	$17,082.00
Delaney	303.11	$160 per hour	$48,497.60
Hager	38.50	$160 per hour	$6,160.00
Law Graduates	43.85	$85 per hour	$3,727.25
Law Students	347.20	$70 per hour	$24,304.00
Total Fees for Merits			$341,737.25

For litigating this fee petition, plaintiffs are awarded fees in accordance with the chart below (subject to change upon the filing of a supplemental motion requesting compensation for reasonable time spent on this fee litigation since the filing of the original motion):

Attorney	*Hours*	*Prevailing Market Rate*	*Amount*
Schember	12.1	$260 per hour	$3,146.00
Gaffney	62.7	$260 per hour	$16,302.00
Law Clerk	27.6	$70 per hour	$1,932.00
Fees for Fee Litigation			$21,380.00

In sum, plaintiffs are awarded attorney's fees as follows:

Total Fees for Merits	$341,737.25
Less Interim Fee Award	($194,868.00)
Fees for Fee Litigation[17/]	$21,380.00
Total Fees to be Awarded by this Order	$168,249.25

[17/] This portion of the award may be amended after the filing of a supplemental motion requesting compensation for reasonable time spent on this fee litigation since the filing of the original motion.

Plaintiffs are hereby awarded $168,249.25 in attorney's fees.

A separate order shall issue this date.

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

DATE: December 13, 1993

APPENDIX A: LAFFEY MATRIX

EXPERIENCE OF ATTORNEY YEARS[1/] (Hourly Rates)

	1980 -81	1981 -82	1982 -83	1983 -84	1984 -85	1985 -86	1986 -87	1987 -88	1988 -89
Very experienced federal litigators (20+ years):	$165	$175	$190	$200	$210	$225	$240	$255	$265
Experienced federal litigators (11th thru 19th years):	$140	$150	$160	$170	$180	$190	$200	$210	$220
Experienced litigator (8th thru 10th years):	$115	$125	$135	$145	$155	$165	$175	$185	$195
Senior associates (4th thru 7th years):	$95	$100	$105	$110	$115	$120	$125	$130	$135
Junior associates (1st thru 3rd years):	$70	$75	$80	$85	$90	$95	$100	$105	$110
Paralegals/Law Clerks:	$30	$35	$40	$45	$50	$55	$55	$60	$60

[1/] June 1 - May 31

APPENDIX B: U.S. ATTORNEY'S OFFICE'S MATRIX

Years (Rate for June 1 - May 31, based on prior year's CPI)

EXPERIENCE	80-81	81-82	82-83	83-84	84-85	85-86
20+ Years	165	175	185	195	205	210
11-19 Years	140	150	160	170	180	185
8-10 Years	120	125	130	135	140	145
4-7 Years	95	100	105	110	115	120
1-3 Years	70	75	80	85	90	95
Paralegals/ Law Clerks	30	35	35	40	40	45

EXPERIENCE	86-87	87-88	88-89	89-90	90-91	91-92
20+ Years	220	230	245	260	275	285
11-19 Years	190	200	210	225	240	250
8-10 Years	150	155	165	175	185	195
4-7 Years	125	130	140	150	160	165
1-3 Years	100	105	110	115	120	125
Paralegals/ Law Clerks	50	55	60	65	70	75

Methodology note: *Laffey*, decided in 1982, set fees for work done in 1981-82. The fees in this matrix are calculated by adding Consumer Price Index (Washington, D.C. Metropolitan Area) increase to the applicable *Laffey* rate for the prior year, then rounding (up, if within $3 of the next multiple of $5).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DARRYL COVINGTON, *et al.*, Plaintiffs,	)	FILED December 13, 1993
v.	)	Civil Action No. 87-2658 (RCL)
DISTRICT OF COLUMBIA, *et al.*, Defendants.	)	

ORDER

This matter comes before this court on plaintiffs' motion for an award of attorney's fees under 42 U.S.C. § 1988, the Civil Rights Attorney's Fee Award Act of 1976. Upon consideration of the pleadings and evidence of both parties, it is hereby, for the reasons set forth in an accompanying memorandum opinion,

ORDERED that plaintiffs' motion for an award of attorney's fees is granted, and it is further

ORDERED that defendants shall, within forty-five days of the date of this order, pay plaintiffs attorney's fees in the amount of $168,249.25, and it is further

ORDERED that plaintiffs shall, within twenty days from the date of this order, file a supplemental motion for award of attorney's fees incurred since the date of plaintiffs' motion for an award of attorney's fees and for expenses, unless a settlement between the parties before then obviates the need to file such a supplemental motion.

SO ORDERED.

/s/Royce C. Lamberth
Royce C. Lamberth
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHERIEL SEXCIUS, *et al.*, Plaintiffs,	)	FILED December 13, 1993
v.	)	Civil Action No. 88-2104 (RCL)
DISTRICT OF COLUMBIA, *et al.*, Defendants.	)	

MEMORANDUM OPINION

This case comes before this court on plaintiffs' motion for an award of attorney's fees and costs under 42 U.S.C. § 1988, the Civil Rights Attorney's Fee Award Act of 1976. Having considered the extensive memoranda and evidence of both parties, this court shall grant plaintiffs' motion, awarding plaintiffs $247,809.87 in attorney's fees and costs. A separate order shall issue this date.

I. BACKGROUND

The case underlying this attorney's fee litigation is an action alleging the violation of First and Fourteenth Amendment rights of two District of Columbia schoolteachers, Sheriel Sexcius and William Edmead, who had spoken out regarding certain educational practices. Attorneys Francine K. Weiss and Edith Barnett represented the teachers, working together in this case as they had long done on other cases.[1/] Ms. Weiss was lead counsel and the point of contact between plaintiffs and counsel and witnesses. (She and Ms. Barnett

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[1/] Ms. Barnett left private practice in late 1991 to become an Administrative Law Judge at the United States Department of Labor.

were aided by three law students, who helped organize documents and research.)

Ms. Weiss and Ms. Barnett won for their clients a permanent injunction forbidding Woodson High School Principal Lucile Christian, Director of the Public School Certification and Accreditation Branch Mary B. Hendrick, the superintendent of schools, the District of Columbia, and the mayor from infringing on plaintiffs' constitutional rights and from retaliating against plaintiffs in the workplace again for speaking out on their educational views. In an order accompanying the resolution of the merits of plaintiffs' claim, this court determined that plaintiffs are entitled to reasonable attorney's fees and costs. *See Sexcius v. District of Columbia*, No. 88-2104, slip op. at 52 (D.D.C. Oct. 15, 1992). The issue now before this court is what constitutes reasonable attorney's fees and costs in this case.

II. ATTORNEY'S FEES

"The initial estimate of a reasonable attorney's fee" -- the so-called lodestar fee -- "is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum v. Stenson*, 465 U.S. 886, 888 (1984) (citations omitted).[2/] To determine the lodestar, this court will determine, in turn, the reasonable hourly rate and the reasonable number of hours billed by counsel.

[2/]This lodestar fee may also be adjusted when necessary in a particular case. *See Blum*, 465 U.S. at 888. In the present case, however, plaintiffs do not seek any lodestar adjustments.

A. Counsel

1. Reasonable Hourly Rate

Plaintiffs claim compensation at a billing rate of $260 per hour, which is (they claim) the prevailing market rate for lawyers with their legal experience. Defendants argue that the appropriate rate is no more than $100 per hour, the rate that plaintiffs paid their counsel throughout this litigation under a retainer agreement. Because plaintiffs' counsel charged plaintiffs this low $100 rate out of public interest motives, plaintiffs are entitled to collect the prevailing market rate, not merely the rate they actually charged plaintiffs.

a. Counsel Charged Reduced Rates in the Public Interest

Plaintiffs' counsel have a tradition of charging their less wealthy clients below-market rates when their cases are important to the public interest. In the present case, for example, because plaintiffs were public school teachers -- in the words of their counsel, "not wealthy people" -- their counsel agreed to charge them only $100 per hour, a "rate[] they could afford." (Defendants have conceded that this $100 rate is below the market rate.)[3/] Counsel charged them this reduced rate in order to take plaintiffs' case, which posed important constitutional questions and affected the educational interests of the city's public school students. (Barnett Decl. (Reply) at ¶6; Weiss Decl. (Reply) at ¶7.)

[3/]According to defendants' evidence, the prevailing market rates of lawyers with more than ten years of litigation experience who handle civil rights and employment discrimination cases in this community were $125 to $150 per hour in 1992. (Zielinski Decl. *Covington v. District of Columbia*, No. 87-2658 (D.D.C. Dec. 13, 1993), Opp'n Mem. Ex. B.)

This is not an atypical case for plaintiffs' counsel. They have a tradition of representing the constitutional and statutory rights of individual employees and employee groups, including labor unions. Because counsel earn their living from their practice, they cannot afford to represent their clients for free. (Weiss Decl. (Reply) at ¶8; Barnett Decl. (Reply) at ¶5.) Instead, they represent their worthy but not wealthy clients at below-market rates. Lawyers who make this kind of noble compromise may recover prevailing market rates for their work. *See Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1520 (D.C. Cir. 1988) (*en banc*) (*SOCM*). Because plaintiffs have shown that their counsel charge below-market rates out of public-spirited motives, plaintiffs are entitled to recover the prevailing market rate for their counsels' services.

b. Prevailing Market Rate

Although plaintiffs are clearly entitled to a fee award calculated at the rates prevailing in the relevant legal market,[4/]

[4/] *See Missouri v. Jenkins*, 491 U.S. 274, 286 (1989). Plaintiffs' counsels' established billing rates -- if counsel have such -- are not directly relevant to the determination of the fee award. *See SOCM*, 857 F.2d at 1524.

For this reason, defendants' reliance on *Kattan v. District of Columbia*, 995 F.2d 274 (D.C. Cir. 1993), is misplaced. In *Kattan*, the parties believed that under the statute in question (20 U.S.C. § 1415(e)(4)(C), the fee-shifting provision of the Handicapped Children's Protection Act), "an attorney's usual billing rate is presumptively the reasonable rate, provided that this rate is 'in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Kattan*, 995 F.2d at 278 (citations omitted). This is a restatement of the *Laffey* test for fixing fee awards. *See Laffey*, 746 F.2d 4, 24-25 (D.C. Cir. 1984).

The *en banc SOCM* court overruled this *Laffey* test with respect to counsel like Ms. Weiss and Ms. Barnett. Where (as here) counsel charge below-market rates

(continued...)

the parties disagree as to which market of legal services is the "relevant market" in this case.

Plaintiffs argue that the matrices and other evidence they have produced, charting the rates charged by lawyers across the District of Columbia for complicated federal litigation, establish the prevailing market rate. This matrix-based evidence would award counsel $260 per hour.

Defendants challenge plaintiffs' matrix-based evidence as too broad to be useful. Plaintiffs' matrices and other evidence survey rates that District of Columbia lawyers earn from commercial clients for performing "general legal services," rates far higher than those the market awards for plaintiffs' civil rights work. (Defs.' Opp'n, at 11.) Ms. Weiss might earn $260 per hour from a commercial client for her general legal services; for her civil rights work for plaintiffs, by contrast, the market would provide her no more than $125-$150 per hour,[5] defendants argue.

Defendants' position may be plausible. As discussed in *Covington v. District of Columbia*, No. 87-2658 (D.D.C. Dec. 13, 1993), no District of Columbia federal court appears to have spoken squarely on the issue of sub-markets, but the

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[4](...continued)
out of public interest motives, the "reasonable hourly rate" is properly calculated not according to the hourly rates that counsel have actually charged in similar cases, but according to "rates that reflect the prevailing community rate for similar legal services." *SOCM*, 857 F.2d at 1517. Counsels' usual billing rate is thus not directly relevant.

[5]This range is based on defendants' evidence. Defendants have submitted seven instances in which lawyers who performed civil rights work for plaintiffs had established billing rates between $125 and $150 per hour.

legislative history of § 1988[6/] and subsequent Supreme Court[7/] and District of Columbia circuit[8/] caselaw construing attorney's fee statutes make clear that in resolving any particular attorney's fee question under § 1988 (including this sub-market question), courts must aim to award attorney's fees that mirror what counsel would earn in the market. If the market would provide different sub-markets[9/] of lawyers different hourly rates, courts properly aiming to mirror the market would award fees accordingly, granting lawyers in each sub-market the fees that their particular services command in the marketplace.

[6/] Senate Report No. 94-1011 (1976) indicates that in enacting § 1988, Congress intended attorney fee awards to reflect the prevailing rates that counsel could have earned in the legal market. *See Blum*, 465 U.S. at 893 (citing S. Rep. No. 94-1011, p.6 (1976)).

[7/] In calculating attorney's fees under § 1988, the Supreme Court has "consistently looked to the marketplace as [its] guide to what is 'reasonable.'" *Jenkins*, 491 U.S. at 286.

[8/] The District of Columbia Circuit has long recognized that under fee-shifting statutes, attorneys should be compensated "for the market value of services rendered." *Copeland v. Marshall*, 641 F.2d 880, 894 (D.C. Cir. 1980) (*en banc*).

Further, some District of Columbia caselaw appears to support defendants' sub-market theory more specifically. The *Copeland* court held that the reasonable hourly rate to be awarded under fee-shifting statutes is the rate "prevailing in the community *for similar work*." *Copeland*, 641 F.2d at 892 (emphasis added). *See also SOCM*, 857 F.2d at 1521 (finding congressional intent to award "rates commensurate with prevailing community standards of attorneys of like expertise *doing the same sort of work in the same area.*") (emphasis added).

[9/] Defendants have not convinced this court that lawyers handling civil rights, employment, or discrimination cases for plaintiffs constitute a sub-market of their own. Perhaps a better defined sub-market would include lawyers handling civil rights, employment, or discrimination cases for private defendants, as well.

Unfortunately, the resolution of the parties' debate in this case is no more satisfying than the resolution of the District of Columbia's identical debate with the plaintiffs in the *Covington* case. Defendants have produced exactly the same evidence in both cases. In that case, as in this one, defendants' evidence is not sufficient to persuade this court that the prevailing rate in the sub-market of plaintiffs' lawyers handling civil rights, employment, and discrimination cases is -- as defendants claim -- lower than the rate prevailing in the broader market of complicated federal litigation.[10/] Because defendants have not carried their evidentiary burden, this court cannot rule for defendants. Because this court cannot rule for defendants, for today plaintiffs' theory that the relevant market

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[10/] Defendants' sole affidavit, sworn by Michael E. Zielinski, Assistant Deputy Corporation Counsel, Civil Division (Opp'n Mem. Ex. B), offers insufficient evidence of this contention.

To challenge plaintiffs' counsels' rates, Zielinski's affidavit cites only seven instances in which lawyers with 10-20 years of experience charged $125 to $150 per hour in representing plaintiffs in civil rights, employment, or discrimination matters. Standing alone, these seven instances are insufficient to demonstrate that $125-$150 per hour is the prevailing rate across the District of Columbia in this sub-market. *See Nat'l Ass'n of Concerned Veterans v. Sec. of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982) (per curiam) (parties opposing fee awards have burden of rebutting evidence favoring high fees with "equally specific countervailing evidence . . . tending to show that a lower rate would be appropriate.") *See also id.*, 675 F.2d at 1337-38 (Tamm, J., concurring).

These seven instances look suspiciously representative of only the lower end of the sub-market. Just because some lawyers are willing to take some civil rights, employment, or discrimination cases at low-end rates of $125 to $150 per hour, does not establish $125 to $150 per hour as the prevailing market rate for the entire sub-market. Defendants have failed to proffer evidence of the high end, as well as the low end, of the range of rates commanded in their proposed sub-market.

should be very broadly defined still stands.[11/] Because plaintiffs have met their evidentiary burden under that theory -- and because defendants' factual rebuttal of plaintiffs' evidence has been ineffectual -- plaintiffs shall be awarded the prevailing market rates for their services in the broadly defined market of complicated federal litigation. This court now turns to the determination of those rates.

[11/]Ruling on the merits of defendants' theory will have to wait for another, better litigated case in which the party opposing fees produces a more thorough evidentiary record. The *Covington* decision's guidance as to what might constitute a better documented case bears repeating:

> "In future cases, parties opposing fee awards might come forward with more persuasive evidence. *A statistically reliable, well-documented, and extensive survey of the rates clients pay for a certain sub-market of legal services* would be powerfully persuasive. Such a survey would collect the rates of a statistically significant number of lawyers or firms within a legal sub-market, convincing the court that the survey's scope is broad enough to reflect the market faithfully. Such a survey would be sufficiently documented with supporting affidavits, assuring the court of the accuracy of the survey's data. Lastly, such a survey would encompass both the high rates that large, prestigious law firms in the area command for their work in the sub-market and the lower rates commanded by others for their work in the sub-market. (Ideally, the survey would also indicate what fraction of clients pay which rates within the sub-market's rate spectrum. That is, the survey would state what fraction of the sub-market's clients take their cases to high-priced firms, what fraction to low-priced firms, and what fraction to firms priced in the middle. This would help the court determine whether any given rate is typical or aberrant.)
>
> Parties seeking fees for legal services performed in a lucrative sub-market -- in the antitrust sub-market, for example -- might proffer a statistically reliable, well-documented, and extensive survey of that sub-market's rates in order to show that in the marketplace, their counsels' work commands high fees. Parties opposing excessive fee awards for work performed in a less lucrative sub-market might proffer a statistically reliable, well-documented, and extensive survey of that sub-market's rates to establish that in the marketplace, counsel would have commanded only a modest fee."

Covington v. District of Columbia, No. 87-2658 (D.D.C. Dec. 13, 1993).

In performing the difficult task of calculating the prevailing market rates for attorney's fees, this court by necessity relies upon the parties' evidence of the prevailing market rates. *See Nat. Ass'n of Concerned Vets. v. Sec. of Defense*, 675 F.2d 1319, 1323-24 (D.C. Cir. 1982) (per curiam) (noting that attorney's fee cases impose a "difficult burden" on a district court and "correspondingly heavy" evidentiary burdens on fee applicants). Defendants' blunderbuss criticisms of plaintiffs' matrices -- as representing only a small percentage of the District of Columbia's Bar, as omitting the "lower end of the market" of legal services, and as failing to reflect the recent slowdown in the growth of rates -- may have merit, but standing alone these criticisms are insufficient to undermine plaintiffs' evidence. *See Concerned Veterans*, 675 F.2d at 1337-38 (Tamm, J., concurring). Because defendants have produced little helpful countervailing evidence and because plaintiffs' evidence -- though not entirely satisfying -- is more persuasive, this court is forced to rely solely upon plaintiffs' evidence.

Plaintiffs' chief evidence is a pair of court-approved matrices. The first of these matrices -- the *Laffey* matrix -- is an updated fee matrix that has been relied upon, at least in part, by six District of Columbia district judges[12/] and that has received a degree of approval from the Court of Appeals for

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[12/] *See Fischbach v. District of Columbia*, No. 87-646 (D.D.C. Jan. 4, 1993) (Penn, J.); *Robles v. United States*, No. 84-3635 (D.D.C. Jan. 10, 1992) (Flannery, J.); *Trout v. Ball*, 705 F. Supp. 705, 709 n. 10 (D.D.C. 1989) (Harold Greene, J.); *Palmer v. Barry*, 704 F. Supp. 296, 298 (D.D.C. 1989) (Oberdorfer, J.); *Thompson v. Barrett*, 599 F. Supp. 806, 814 (D.D.C. 1984) (Richey, J.); *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 371-75 (D.D.C. 1983) (Robinson, J.), *aff'd*, 746 F.2d 4 (1984), *rev'd on other grounds, SOCM*.

the District of Columbia Circuit.[13/] The second matrix -- developed by the U.S. Attorney's Office for the District of Columbia for use in negotiating settlements[14/] -- extrapolates from the 1981-82 rates set by the *Laffey* court in 1982[15/] by adding the Consumer Price Index increase for the Washington, D.C., metropolitan area to the prior year's rate, and rounding upwards if the sum is within $3 of the next $5 multiple. (*See Covington*, Appendix B, Methodology Note.) The rate for 1991-92, the last fee year charted by the U.S. Attorney's Office's matrix, is $250 per hour. (*See Covington*, Appendix B.) Plaintiffs follow the U.S. Attorney's Office's extrapolation method to calculate a 1992-93 hourly rate of $260.[16/] Relying upon plaintiffs' inadequately rebutted (but not unrebuttable) evidence, this court finds that the prevailing market rate for 1993 is $260 per hour.

[13/] *See SOCM*, 857 F.2d at 1525 (commending use of *Laffey* matrix). *See also Goos v. National Association of Realtors*, 997 F.2d 1565, 1568 (D.C. Cir. 1993) (*dicta* implying that the *Laffey* matrix is "the schedule (or matrix) of prevailing community rates [that has been] adopted in this circuit.").

The matrix is set forth in *Covington v. District of Columbia*, No. 87-2658 (D.D.C. Dec. 13, 1993), Appendix A.

[14/] This matrix is set forth in *Covington*, Appendix B.

[15/] *See Laffey*, 572 F. Supp. at 371.

[16/] Plaintiffs multiply $250 per hour by the 3.4 percent rate of the Metropolitan Area Consumer Price Index, add that to the matrix's 1991-92 rate of $250 per hour, and round up to the nearest $5 increment. (Pls.' Application, at 3.)

Defendants claim that legal rates are not rising in the current market, and they challenge plaintiffs' annual escalation of rates. However, defendants have not submitted enough persuasive evidence for this court to rule in its favor on this point. Defendants have submitted salary charts from the *Legal Times* which show that although many firms did not raise their rates every year between 1989 and 1992, some firms increased their rates by more than $25 per hour per year.

c. Retainer Provision

Defendants' final argument against plaintiffs' requested $260 hourly rate stems from defendants' interpretation of a provision of the retainer agreement between plaintiffs and their counsel. Under the retainer agreement, plaintiffs paid their counsel only $100 per hour for their time on this case, and plaintiffs and their counsel agreed that any portion of a fee award that exceeds "the amount of fees actually incurred by the clients" shall be remitted to the clients. Believing this provision to award plaintiffs any portion of the award that exceeds the $100 hourly rate that plaintiffs paid their counsel under the agreement, defendants argue that awarding any rate higher than that $100 rate would grant plaintiffs an impermissible windfall and violate the bar of *Kay v. Ehrler*, 111 S. Ct. 1435 (1991), against awarding fees to *pro se* plaintiffs.

Defendants have misconstrued the retainer agreement. It does not remit to plaintiffs any fraction of this fee award that exceeds the amount plaintiffs have already paid their counsel, as defendants claim. Rather, it simply prevents counsel from receiving double payment for their services. The agreement guarantees that counsel will not collect both the court's award of fees for their work and plaintiffs' payment of fees to them for that same work. Under the agreement, once counsel have in hand both the court's fee award and the fees paid to them by plaintiffs, counsel must subtract from that combined amount the "fees actually incurred by the clients" -- *i.e.*, the hours counsel worked for plaintiffs multiplied by the reasonable hourly rate -- and remit the difference to plaintiffs. In short, the retainer agreement ensures that counsel receive only what they have earned (or more precisely, what they would have earned if they had charged market rates).

This is the understanding of this provision shared by plaintiffs[17/] and their counsel.[18/] Nothing in the provision prevents this court from awarding plaintiffs a rate higher than $100 per hour.

2. Reasonable Number of Hours Expended

Plaintiffs request compensation for the hours they expended on this case, including time expended litigating this fee petition. (A reasonable fee for time reasonably expended on fee applications is recoverable. *See, e.g., Sierra Club v. E.P.A.*, 769 F.2d 796, 811 (D.C. Cir. 1985); *Environmental Defense Fund v. E.P.A.*, 672 F.2d 42, 62 (D.C. Cir. 1982).) Defendants argue that these claimed hours should be cut by five percent, mainly because plaintiffs did not support with specific examples their assertions that they used sound billing judgment.

Yet plaintiffs' counsel did use good billing judgment, well-documented for this court's review. (Weiss Decl. (Application) at ¶12; Barnett Decl. (Application) at ¶1.) For example, Ms. Weiss reduced her bills by about twenty hours in October 1988 when she felt that her daughter's hospitalization distracted her and made her less efficient. Ms. Weiss also carefully billed the 17.05 hours she spent doing paralegal work -- drafting and updating a chronology of events, summarizing documents, organizing documents and preparing exhibits -- at paralegal rates, not at her own higher rates. (Weiss

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[17/] Sexcius Decl. (Reply) at ¶1; Edmead Decl. (Reply) at ¶1.

[18/] Barnett Decl. (Reply) at ¶2.

Decl. (Application) at ¶12.)[19/] Defendants charge that time plaintiffs' counsel billed for meetings between Ms. Weiss and Ms. Barnett is duplicative, yet at these meetings counsel tried to coordinate plaintiffs' litigation strategies for efficiency. In any event, Ms. Weiss has not billed for at least twenty hours of the time she spent conferring with Barnett. Lastly, in plaintiffs' application counsel deleted all non-billed and non-billable matters. For example, counsel also did not charge for the two hours spent conferring with another attorney who was also litigating against the District of Columbia. Nor did Ms. Weiss charge for about twelve hours she spent calling plaintiffs, witnesses, or Ms. Barnett from home.

In short, plaintiffs' counsel used sound billing judgment and documented their billing decisions well enough for this court to confirm that. Plaintiffs may recover fees for all of their time.

B. Law Clerks

For the services of their counsels' law clerks and for the time that Ms. Weiss spent doing law-clerk-type chores, plaintiffs claim $5,228.00, for 65.35 hours at $80 per hour. (Reply Ex. 1.)

The work of paralegals and law clerks is compensable, as part of a "reasonable attorney's fee," according to the practice prevailing the legal community. *See Jenkins*, 491 U.S. at

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[19/]Defendants contend that Ms. Weiss should also have billed at paralegal rates her time spent summarizing depositions. Although Ms. Weiss did bill only at paralegal rates for her time spent summarizing documents generally, the work of reviewing and summarizing the depoaition testimony of important witnesses is different, especially as counsel is a small firm that cannot delegate such tasks to junior lawyers. Ms. Weiss deserves to be compensated at her higher rates for this work.

285-87. The prevailing practice in the District of Columbia is for lawyers to bill clients for the work of their law clerks at the prevailing market rate.[20/] Plaintiffs have submitted reasonably persuasive, effectively unrebutted, evidence that the current prevailing market rate for law clerks in the District of Columbia is $80 per hour. (The hourly rate plaintiffs claim -- $80 per hour -- is the rate that the U.S. Attorney's matrix would award for the year 1992-93 if the matrix were extended to this year according to the matrix's own extrapolation method.)[21/] Plaintiffs have documented the time of their law students and of Ms. Weiss in sufficient detail, listing services performed by date and time. (Reply Ex. 6). Thus, plaintiffs may recover their requested fees for their law clerks.

C. Current Rates

Plaintiffs request a fee award calculated at current, not historical, rates. Because awarding current rates may mitigate the hardship of the seven years' delay between the first billing in this case and final payment,[22/] plaintiffs shall be compensated at current market rates.

[20/] *See, e.g., In re Donovan*, 877 F.2d 982, 993, 997 (D.C. Cir. 1989) (per curiam); *In re Olson*, 884 F.2d 1415, 1426 (D.C. Cir. 1989).

[21/] Defendants make the same objections to this $80 per hour matrix-based rate that they made to plaintiffs' counsel's $260 per hour matrix-based rate. Yet defendants have submitted only two instances in which District of Columbia lawyers requested less than $80 per hour for the work of paralegals or law clerks, insufficient evidence that the prevailing market rate for the work of paralegals or law clerks across the District of Columbia is less than $80 per hour.

[22/] Plaintiffs have been incurring fees since late 1987. No interim settlement of attorney's fees or costs provided plaintiffs with more timely compensation.

III. COSTS

Plaintiffs seek an assortment of out-of-pocket costs incurred in the course of this litigation, and the question before this court is which of these costs Congress has authorized this court to shift to defendants. In § 1988, Congress has authorized the shifting of only those out-of-pocket costs that are customary elements of an "attorney's fee"; in 28 U.S.C. § 1920, Congress has authorized the shifting of other out-of-pocket costs. This court may shift only those costs that fit into one of these two categories.[23/]

The former category -- encompassing all customary elements of an "attorney's fee" -- includes all those out-of-pocket expenses that have "traditionally been included in calculations of the lawyers' hourly rates," including those out-of-pocket costs that many lawyers have recently removed from their hourly rates and now bill separately to the client.[24/]

[23/] In *West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138, 1141 (1991), the Supreme Court used this two-part analysis to determine whether § 1988 permitted fees for experts' nontestimonial services to be shifted to a losing party. First, the Court found that "none of the categories of expense listed in § 1920 can reasonably be read to include" fees for experts' nontestimonial services. 111 S. Ct. at 1141. Second, the Court determined that "the phrase 'attorney's fees' [does not] embrac[e] fees for experts' services." *Id.* at 1146. Because fees for experts' nontestimonial services fell into neither category, the Court concluded that courts lacked power to shift those fees.

[24/] *West Virginia*, 111 S. Ct. at 1147. *See also Northcross v. Board of Ed. of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980) (defining the term "attorney's fees" to include out-of-pocket expenses that are "'incidental and necessary expenses incurred in furnishing effective and competent representation' [and] those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services.") (citations omitted).

Other statutes, notably 28 U.S.C. § 1920, determine which items of expense are included in the latter category.[25] These include "those costs incurred by a party to be paid to a third party, not the attorney for the case, . . . including, among others, docket fees, investigation expenses, deposition expenses, witness expenses, and the costs of charts and maps." *Northcross*, 611 F.2d at 639.

A. Costs Incurred by Plaintiffs' Counsel

Plaintiffs claim reimbursement for two sets of expenses incurred in this litigation: costs their counsel incurred, and costs plaintiffs themselves incurred. Under the first heading, plaintiffs claim compensation for costs of deposition transcripts, subpoenas, photocopying, postage, complaint filing fee, long distance telephone calls, messenger service, and local transportation and parking that their counsel incurred litigating *Sexcius*.

1. Costs Traditionally Included in an "Attorney's Fee"

Reasonable photocopying, postage, long distance telephone, messenger, and transportation and parking costs are customarily considered part of a reasonable "attorney's fee."[26] If

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[25] *See West Virginia*, 111 S. Ct. at 1141 & n.3 (restating holding of *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), that § 1920 and other statutes "define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further.").

Other statutes further define some of the terms of § 1920. For example, 28 U.S.C. § 1821(b) caps the per diem amount that may be taxed for "witnesses" (including expert witnesses) under § 1920(3).

[26] *See, e.g., Jenkins*, 491 U.S. at 285 (including the cost of secretaries and messengers in a reasonable attorney's fee); *Northcross*, 611 F.2d at 639 (including

(continued...)

plaintiffs' request for these costs are sufficiently well-documented and reasonable, plaintiffs may recover these out-of-pocket expenses pursuant to the statutory authority of § 1988 to shift "attorney's fees."

Defendants have conceded that the amounts plaintiffs have claimed in photocopying, postage, and long distance telephone calls costs are "reasonable expenses." (Defs.' Opp'n, at 25.) However, defendants do challenge plaintiff's counsels' travel expenses and messenger service expenses as insufficiently documented. (Defs.' Opp'n, at 26.) Defendants are correct that plaintiffs' original request for messenger service costs was too high. However, in their reply memorandum, plaintiffs eliminated all hourly messenger charges and requested compensation for only the remaining standard fees. (Reply Ex. 10.) These standard fee charges are well-documented and reasonable, and plaintiffs may recover them.

Similarly, in their application, plaintiffs claimed $123.60 for their counsels' local transportation and parking costs. After defendants challenged this amount as unsupported, plaintiffs cut from their request all but the well-documented costs, requesting only $108.50 in charges listed by date and amount. Plaintiffs may recover this reduced amount.

2. Costs Shifted by § 1920

The costs associated with deposition transcripts are clearly compensable under § 1920(4), if the costs are reasonable, the expenditures well-documented, and the depositions "necessarily obtained for use in the case." 28 U.S.C. § 1920(4).

26/(...continued)
photocopying, travel, and telephone costs as customary elements of an attorney's fee).

See Robertson v. McCloskey, 121 F.R.D. 131, 134 (D.D.C. 1988) ("costs associated with taking depositions" are taxed under § 1920(4) as transcripts "necessarily obtained").

Because defendants have conceded that plaintiffs' deposition transcript costs are "reasonable,"[27] and because the costs of the deposition transcripts are well-documented, plaintiffs may recover their claimed deposition costs. Plaintiffs may also recover their claimed filing fees.

3. Costs that Cannot be Shifted

Plaintiffs' subpoena costs may not be shifted to defendants. The cost of subpoenas is not a customary element of an attorney's fee, and it is clearly not taxed under § 1920.[28]

B. Costs Incurred by Plaintiffs Themselves

Plaintiffs also seek compensation for a second category of costs: the costs incurred not by counsel, but by plaintiffs themselves. Plaintiffs themselves paid out-of-pocket for some of the photocopying and postage costs of their case, incurred some travel expenses going to and from litigation-related events, and lost a portion of their wages while litigating this case.

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[27] Defs.' Opp'n, at 25.

[28] *See Zdunek v. Washington Metropolitan Area Transit Authority*, 100 F.R.D. 689, 692 (D.D.C. 1983) (cost of hiring special process servers to serve subpoenas not a taxable cost). *See also* 10 Wright & Miller, *Federal Practice and Procedure* § 2677, at 371-72 (1983).

1. Costs of Photocopying, Postage, and Travel

In order to save money, plaintiffs' counsel recruited plaintiffs themselves to review and forward new documents to Ms. Weiss and to interview potential witnesses. In doing these tasks, plaintiffs incurred some photocopying and postage costs that their counsel could have incurred had counsel done the tasks in the first place. (Weiss Decl. (Application) at ¶14.)

Because reasonable photocopying and postage are customarily considered part of a reasonable "attorney's fee," plaintiffs' out-of-pocket expenses would clearly be compensable if their counsel had incurred them first and then billed these costs to plaintiffs. *See Northcross*, 611 F.2d at 639. Denying plaintiffs compensation for these costs would force clients in the future to insist on the senseless formality of having their counsel incur out-of-pocket costs first (perhaps at higher expense) and bill them afterwards. Plaintiffs' requests for reimbursement of photocopying and postage costs are well-documented, and defendants concede the amounts claimed are "reasonable." (Defs.' Opp'n, at 25.) Plaintiffs may recover their out-of-pocket photocopying and postage costs.

However, plaintiffs may not recover their travel expenses. In her declaration, Ms. Weiss states that plaintiffs also incurred "travel" costs in the course of reviewing and forwarding new documents to counsel and interviewing potential witnesses. (Weiss Decl. (Application) at ¶14). If this were true -- if, for example, plaintiffs had incurred travel costs running about town doing the sort of work that their lawyers would have done if plaintiffs themselves had not -- plaintiffs would have a plausible claim. They might have persuasively argued that they were simply incurring travel costs that their counsel would have billed to them anyway, had counsel performed the travel themselves.

However, the travel costs claimed by plaintiffs appear to be costs for which their counsel could never have billed them. Plaintiffs claim compensation for transportation and parking associated with court hearings and depositions, events that their counsel undoubtedly attended as well. (Pls.' Ex. 9 (Reply) at ¶B.) In this instance, plaintiffs were clearly not incurring costs in their counsels' stead. Rather than seeking compensation for the type of costs routinely incurred by lawyers and billed to clients, plaintiffs are attempting to claim compensation for their personal costs. Thus plaintiffs may not recover their transportation and parking costs that they themselves incurred.

2. Lost Wages

Plaintiffs also claim compensation for the wages they lost taking leave to assist in the development and trial of this case. Ms. Sexcius missed several days of work on unpaid leave in order to prepare for court appearances, appear in court, confer with counsel and potential witnesses, and review and prepare court documents. (Sexcius Decl. (Application) at ¶1.) (Mr. Edmead appears to have taken time off work to make similar efforts to develop the case, but he has not submitted an affidavit stating that his work leave was unpaid.)

However, Congress has not authorized the courts to shift the expense of wages lost during the course of litigation. Lost wages are clearly not one of the elements of an "attorney's fee" shifted by § 1988. Elements of an attorney's fee must be, at a minimum, those costs that are incurred by the *attorneys* (or that easily could have been incurred by the attorneys, *see supra* (III)(B)(1)) and then billed to the clients. Plaintiffs' loss of wages, by contrast, is an out-of-pocket loss that has nothing to do with attorneys' billing practices. Nor are lost wages one of the costs Congress has shifted under § 1920 or

some other statute. Section 1920 makes no mention of lost wages in its list of taxable costs, and this court knows of no other statute that expressly shifts lost wages to the losing party.[29/]

Because Congress has not empowered this court to shift the burden of lost wages under § 1988, § 1920, or other statute, this court cannot award plaintiffs the wages they lost during litigation. This conclusion conflicts with this Circuit's 1984 ruling that § 1988 shifts lost wages,[30/] but it is faithful to the Supreme Court's 1991 ruling that unless an out-of-pocket expense is either a traditional element of a § 1988 "attorney's fee" award, or is expressly shifted by § 1920 or some other statute, federal courts lack power to shift the cost. In the present case, § 1988 and § 1920 "define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further."[31/]

IV. CONCLUSION

For litigating the merits of *Sexcius* and for litigating this fee petition, plaintiffs are awarded fees in accordance with the chart below:

[29/]Of course, plaintiffs might have been able to claim the cost of their lost wages as part of their damages award. Plaintiffs did not do so in the present case.

[30/]*See Laffey*, 746 F.2d at 30 (holding that in enacting § 1988, Congress intended plaintiffs to recover wages lost during litigation). *See also Kyles v. Sec. of Agriculture*, 604 F. Supp. 426, 437 n.21 (D.D.C. 1985) (ruling that in an attorney's fee award, plaintiffs may recover "annual leave consumed . . . in connection with [their] claim."); *Laffey*, 572 F. Supp. at 386 n.73.

[31/]*West Virginia*, 111 S. Ct. at 1141.

Attorney	Hours	Prevailing Market Rate	Amount
Ms. Weiss			
-Original request	629.85	$260 per hour	$163,761.00
-Supplemental request	2.85	$260 per hour	$5,941.00
Ms. Barnett			
-Original request	249.35	$260 per hour	$64,831.00
-Supplemental request	9.85	$260 per hour	$2,561.00
Law Students	65.35	$80 per hour	$5,228.00
Total Fees for Merits and Fee Litigation			$242,322.00

For litigating the merits of *Sexcius* and for litigating this fee petition, plaintiffs are awarded costs in accordance with the chart below:

Type Costs Incurred by Counsel	Amount
-Deposition transcripts	$1,372.10
-Photocopying	$1,833.90[32/]
-Postage	$ 180.44
-Filing fee for complaint	$ 120.00
-Long distance telephone calls	$ 8.55
-Messenger service	$ 490.20
-Transportation and Parking	$ 108.50

[32/] In their application, plaintiffs requested this amount for photocopying and requested $180.44 for postage. Defendants in their opposition do not contest these amounts. In their reply brief, plaintiffs requested a higher amount for both photocopying and postage, without explanation or documentation. Only the lower, uncontested amounts will be awarded.

Costs Incurred by Plaintiff Sexcius	
-Photocopying	$1,167.14
-Postage	$ 60.00
Costs Incurred by Plaintiff Edmead	
-Photocopying	$ 967.14
-Postage	$ 26.95
Total Costs	$6,334.92

In sum, plaintiffs are awarded attorney's fees and costs as follows:

Total Fees for Merits and Litigation	$242,322.00
Costs	$ 6,334.92
(Less amount paid for contempt)	($ 847.05)
Total Fees and Costs	$247,809.87

Plaintiffs are hereby awarded $247,809.87 in attorney's fees and costs.

/s/Royce C. Lamberth
Royce C. Lamberth
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHERIEL SEXCIUS, *et al.*, Plaintiffs,	)	FILED December 13, 1993
v.	)	Civil Action No. 88-2104 (RCL)
DISTRICT OF COLUMBIA, *et al.*, Defendants.	)	

ORDER

This matter comes before this court on plaintiffs' motion for an award of attorney's fees and costs under 42 U.S.C. § 1988, the Civil Rights Attorney's Fee Award Act of 1976. Upon consideration of the record herein, it is hereby, for the reasons set forth in an accompanying memorandum opinion,

ORDERED that plaintiffs' motion for an award of attorney's fees and costs is granted, and it is further

ORDERED that defendants shall, within forty-five days of the date of this order, pay plaintiffs attorney's fees and costs in the amount of $247,809.87.

SO ORDERED.

/s/Royce C. Lamberth
Royce C. Lamberth
United States District Judge

DATE: December 13, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONALD GALLOWAY, Plaintiff,	)	FILED April 21, 1994
v.	)	Civil Action No. 91-0644 (JHG)
THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, *et al.*, Defendants.	)	

MEMORANDUM OPINION AND ORDER

On March 16, 1993, the Court issued a Memorandum Opinion and Order entering judgment in favor of plaintiff and establishing a briefing schedule to determine the availability and amount of damages. At the conclusion of an evidentiary hearing held on July 26, 1993, the Court awarded plaintiff thirty thousand dollars in compensatory damages for the reasons stated orally at that hearing. Presently pending is plaintiff's motion for attorneys' fees and costs.

Both parties agree that fees are justified, that the hours expended by plaintiff's counsel are reasonable, and that the lodestar method of determining fees should be employed. The only issue remaining in dispute is the reasonableness of the hourly fees requested by plaintiff's counsel.

Plaintiff contends that the hourly rates set forth in the *Laffey* Matrix should be utilized to determine the rates of compensation for his various counsel. As an example, under this method, one of plaintiff's primary counsel, Vicki Golden ("Golden"), would receive $250 per hour for work completed

in 1992 and $260 per hour for work done in 1993. However, it appears that Golden has never earned that amount in her primarily employment discrimination private practice. She states that depending upon the circumstances, she charges anywhere from a contingent fee to $200 per hour.

In contrast to the rates requested by plaintiff, the District of Columbia maintains that the prevailing market rate for civil rights attorneys, not the rate for the broader District of Columbia Bar that the *Laffey* Matrix encompasses, must be utilized. The District contends that that rate for civil rights attorneys ranges from $135 per hour to $150 per hour. In support of this proposition, the defendant presents a sworn declaration listing the rates charged by seven District of Columbia civil rights attorneys.

Indisputably, Galloway is entitled to receive as attorneys' fees the prevailing market rate in the community. *See Blum v. Stenson*, 465 U.S. 886, 895 (1984). The starting point in "prevailing market rate" analysis is often *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988) (en banc) ("*SOCM*"). That case addressed the rates to be paid to private practice but public interest spirited attorneys. In overruling an earlier case awarding private practice attorneys only the reduced rate they had charged the particular client, the *SOCM* Court noted that Congress did not intend

> the private but public-spirited rate-cutting attorney to be penalized for his public spiritedness by being paid on a lower scale than either his higher priced fellow barrister from a more established firm or his salaried neighbor at a legal services clinic.

Id. at 1524. Consequently, the prevailing market rate theory was held to apply to "attorneys practicing privately and for profit but at reduced rates reflecting non-economic goals." *Id.*

Because this case involves both attorneys who practice privately and for profit but who give reduced rates to many clients, and attorneys who practice in public interest legal services organizations, *SOCM* is particularly relevant. Taking Golden as an example is illustrative. Here, Golden contends that she left both her government position and then her large firm practice in order to practice employment discrimination law, which practice often involves unemployed clients. As a consequence of the type of work she now undertakes and the class of client she currently represents, she does not have any one average billing rate. Golden utilizes both contingent fee arrangements and differing hourly compensation, charging up to $200. Golden notes that had she stayed at Swidler & Berlin, an attorney of her experience would now be billed at a rate of $275 an hour. Thus, Ms. Golden is exactly the type of private attorney who charges reduced rates to clients due to non-economic goals discussed in *SOCM*. As such, although in other cases the attorney's "usual billing rate" may be of great assistance to the determination of the prevailing market rate, that is not the case here.

Although the Court is not completely satisfied by the *Laffey* Matrix,[1/] that Matrix has been frequently applied or approved by other courts and it continues to provide the most credible evidence available of rates for this market. *See, e.g., SOCM*,

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[1/]The Court accepts as credible evidence the Matrix, but nonetheless would hope that a more complete breakdown and study of rates could be compiled for future use in attorneys' fees awards. The *Laffey* Matrix does not differentiate between an attorney with twelve years of experience and one with eighteen years. This Court concludes, as Judge Lamberth does that: "In future cases, this court hopes to base its calculations on statistically reliable, well-documented, and extensively surveyed evidence of the sort described above." *Covington v. District of Columbia*, No. 87-2658, slip op. at 14 (D.D.C. Dec. 17, 1993). Until that time, however, the *Laffey* Matrix will continue to provide credible evidence of prevailing market rates.

857 F.2d at 1525 ("[W]e commend [the use of the fee schedule complied by the district court in *Laffey*] for the year to which it applies. Perhaps the most desirable result of the present litigation would be the compiling of a similar schedule of prevailing community rates for other relevant years."); *Trout v. Ball*, 705 F. Supp. 705, 709 n.10 (D.D.C. 1989) ("Although the updated [*Laffey*] matrix was never expressly approved by the court [in *SOCM*] because the parties settled the issue of fees, it does provide an accurate and updated schedule of attorney fees in this District."); *Palmer v. Barry*, 704 F. Supp. 296, 298 (D.D.C. 1989) (taking judicial notice of *Laffey* Matrix rates); *Covington*, slip op., at 13 (applying *Laffey* Matrix); *Sexcius v. District of Columbia*, No. 88-2104, slip op., at 9-11 (D.D.C. Dec. 13, 1993) (applying *Laffey* Matrix); *Fischbach v. District of Columbia*, No. 87-0646, slip op., at 7 (D.D.C. Jan. 4, 1993) ("The Court accepts the *Laffey* matrix."). The figures provided by the defendant's declaration are significantly less persuasive. As the Court in *Covington* and *Sexcius* noted, seven examples of what civil rights attorneys charge -- "a small percentage of the District of Columbia's Bar" -- is insufficient to undercut plaintiff's reliance on the *Laffey* matrix.[2/] *See Sexcius*, slip op., at 5-8; *Covington*, slip op., at 7-8.

As a consequence, the Court will apply the rates provided on the *Laffey* Matrix to the attorneys in this case. The following is the breakdown of number of hours expended multiplied by the *Laffey* Matrix rate for each attorney or law clerk involved:

[2/] Because the defendant's evidence supporting its argument that the prevailing market rate for civil rights attorneys in the District of Columbia ranges from $135 to $150 per hour is so meager, the Court will not decide whether the prevailing market rates of a particular subpart of the District of Columbia Bar should be applied instead of the general rates provided in the *Laffey* Matrix.

Vicki G. Golden (18 years experience):

1992	99.70 hours x $250 =	$24,925.00
1993	72.10 hours x $260 =	18,746.00

Charles Cervantes (15 - 19 years experience)[3/]:

1992	2.00 hours x $250 =	500.00

David R. Cashdan (over 20 years experience):

1993	4.1 hours x $300 =	1,230.00

Lisa Sotir (1 - 2 years experience):

1992	2.60 hours x $125 =	325.00

Mary DeSales Linton (approximately 4 years experience):

1993	10.70 hours x $175 =	1,872.50

Timothy Cook (9 - 10 years experience):

1991	11.90 hours x $175[4/] =	2,082.50

[3/] Although the motion for attorneys fees states that Mr. Cervantes has 18 years of experience, the Golden Affidavit mentions only 15 years of experience. However, because the Laffey Matrix groups attorneys with 11 to 19 years of experience together, this discrepancy is immaterial to Mr. Cervantes' hourly fee.

[4/] Although Mr. Cook has 9 to 10 years of experience and could be billed at a rate of $215 per hour under the Laffey Matrix, plaintiff has only requested $175 per hour. The Court accepts that for reasons known to plaintiff, the lower rate is the more appropriate rate for Mr. Cook's services.

Joseph Russo (approximately 2 - 3 years experience):

1991-92[5/]	182.50 hours x $125	22,812.50
Law Clerks:		
1991	98.25[6/] hours x $75	7,368.75
Total Attorneys Fees:		$79,862.25

The defendant has not challenged the $2,242.95 in costs sought by plaintiff. Accordingly, it is hereby

ORDERED that plaintiff is awarded attorneys fees and costs in the amount of $81,105.20 (eighty-one thousand one hundred five dollars and twenty cents).[7/]

IT IS SO ORDERED.

April 21, 1994.

/s/Joyce Hens Green
JOYCE HENS GREEN

[5/]The vast majority of Mr. Russo's hours were expended in 1991 when the Laffey Matrix rate for an attorney of his experience was $125 per hour. That rate increased to $130 per hour in 1992. Because plaintiff has not requested that the $130/hour rate be applied for the 7.25 hours worked in 1992, the Court will not do so either.

[6/]Plaintiff's motion contains a typographical error: He lists a total of 99.25 law clerk hours instead of 98.25 hours (23 for Leigh Ann Griggers and 75.25 for Stephen Whiting).

[7/]This total amount encompasses the attorneys' fees and costs requested for all work accomplished in this case, including preparation of the reply memorandum submitted in support of the attorneys' fees request.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7014 **September Term, 1995**
USDC CV 87-2658

Darryl COVINGTON, et al.,
Appellees,

v.

Filed Sep 12 1995

DISTRICT OF COLUMBIA, et al.,
Appellants.

AND CONSOLIDATED CASES

BEFORE: Edwards, Chief Judge, Wald and Henderson, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed July 21, 1995, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: */s/Robert A. Bonner*
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7014

September Term, 1995
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Darryl COVINGTON, et al.,
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v.

Filed Sep 12 1995

DISTRICT OF COLUMBIA, et al.,
Appellants.

AND CONSOLIDATED CASES

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Appellants' Suggestion For Rehearing *In Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *in banc* that the suggestion is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: */s/Robert A. Bonner*
Robert A. Bonner
Deputy Clerk

Circuit Judges Williams and Henderson would grant the suggestion.

Circuit Judge Tatel did not participate in this matter.